Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROY NESET,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a micro-radio broadcaster entitled to raise a constitutional defense to the U.S. government's enforcement action against him in the District Court where the Government instituted the proceeding and where 47 U.S.C. § 401(a), which governs such enforcement, vests jurisdiction in the District Court?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 235 F.3d 415 (8th Cir. 2000) and is reprinted in the Appendix. A-1 – A-15. The opinion of the United States District Court for the District of North Dakota is reported at 10 F. Supp.2d 1113 (D.N.D. 1998) and is reprinted in the Appendix. A-16 – A-26.

JURISDICTION

The Decision of the United States Court of Appeals for the Eighth Circuit was entered on November 28, 2000. A-1. The Order of the Eighth Circuit denying the petition for rehearing and for rehearing en banc (with four judges voting to rehear the case) was entered on March 15, 2001. A-27.

This Court has jurisdiction to review the decision of the Eighth Circuit under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

47 U.S.C. § 401(a). Enforcement provisions.

(a) Jurisdiction. The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

47 U.S.C. § 402(a)-(b). Judicial review of Commission's orders and decisions.

(a) Procedure. Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code.

(b) Right to appeal. Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide inter-LATA services under section 271 of this Act whose application is denied by the Commission.

28 U.S.C. § 2342. Jurisdiction of court of appeals.

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of –

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of –

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, or 41 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839[, and 841a]) or pursuant to part B or C of subtitle IV of title 49; and

(B) the Federal Maritime Commission issued pursuant to –

(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d)[)]; (iv), (v) [Redesignated]

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

STATEMENT OF THE CASE

A. Introduction

Petitioner Roy Neset ("Neset") is a farmer in Tioga, North Dakota, a small town in the upper northwest corner of the state. A-2. Tioga has only one radio station, country station KTGO A.M. *Id.* Unhappy with this extremely limited range of programming, Neset, who

enjoys listening to talk radio, sought and received written permission from a Colorado radio station to rebroadcast its programs on his micro-radio transmitter. A-2 – A-3. Neset used a one-watt transmitter with a 30-watt amplifier to broadcast from his house to his tractor so that he could hear the broadcasts while working in his fields. A-3. The signal could be received for approximately five miles from Neset's property, and approximately 8-10 other individuals listened to the broadcasts. *Id.* Neset's signal did not interfere with any other broadcasts or stations, nor did it threaten public safety. *Id.*

Under federal law, it is unlawful to broadcast over the radio without a license, and Neset did not a have a broadcast license for his micro-radio station. A-3. However, current regulations of the Federal Communications Commission ("F.C.C."), as well as those enforced when this case began, *see* 47 C.F.R. § 73.512(c), prohibit Neset and others like him from gaining a license to micro-broadcast.[1] This regulatory anomaly has led to a major controversy between the F.C.C. and micro-broadcasters seeking to air diverse community-based programming using relatively inexpensive and widely accessible broadcasting equipment. Before turning to the specifics of

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[1] The F.C.C.'s refusal to license micro-broadcasters has been in effect since 1978, except in Alaska. The F.C.C. has now promulgated rules allowing micro-broadcasters to apply for licensure, but those rules flatly disallow any micro-broadcaster who previously engaged in unlicensed broadcasting, such as Neset, from doing so. *See F.C.C. Report and Order in Creation of Low Power Radio Service*, 15 F.C.C.R. 2205, FCC 00-19, MM Docket No. 99-25, § 54 (Jan. 27, 2000).

Neset's case, it is important to set forth the background of micro-broadcasters' conflict with the F.C.C.

B. A Brief History Of Micro-Radio

Before 1978, individuals like Neset who wished to start micro-radio stations could do so by obtaining a Class D license from the F.C.C. *See* Walker, *With Friends Like These: Why Community Radio Does Not Need the Corporation for Public Broadcasting* ("*With Friends Like These*"), Cato Policy Analysis No. 277 (The Cato Institute, July 24, 1997) (also at *http://www.cato.org/pubs/pas/pa-277.html*). The Class D license allowed community and educational stations to broadcast in the noncommercial portion of the spectrum, and these stations began to multiply, creating an outlet for community and educational radio. However, the Corporation for Public Broadcasting, among others, began pressuring the F.C.C. to reconsider its rules and preserve the lower end of the spectrum for use by public radio stations. *Id.*

In 1978, the F.C.C. changed its rules, announcing that it would no longer license stations of 10 watts or less (except in Alaska, which has a separate system of spectrum regulation). *See* 47 C.F.R. §§ 73.211(a); 73.511(a) ("[n]o new noncommercial educational station will be authorized with less power than minimum power requirements for commercial class A facilities"); *Changes in Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C.2d 240 (1978) ("*Second Report and Order*"), *modified*, 70 F.C.C.2d 972 (1979). After 1980, all FM stations had to maintain a minimum effective radiated power of 100 watts. This change was ostensibly

made to ensure more "efficient" and "effective" use of educational noncommercial FM radio service. *Second Report and Order*, 69 F.C.C.2d at 248. As a result, no new Class D applications may now be filed with the F.C.C. 47 C.F.R. § 73.512(c).

This regulatory scheme resulted in pockets or "holes" of unused parts of the broadcast spectrum too small to accommodate a full-power commercial station, but perfect for small broadcasters. Walker, *With Friends Like These*. During this same time, the cost of starting a low-power station dropped dramatically, and micro-broadcasters could now more easily and with little expense create and operate low-power radio stations of less than 100 watts. *Id*. Thus, the F.C.C. regulations governing the issuance of licenses began to clash with technological advancements and the desire of individuals to create alternatives to commercial radio in their communities. As Walker explains, "by the end of the 1980s, illegal micro-stations appeared throughout the country, filling the void the outlawed Class D outlets had left behind." *Id*. Many saw themselves as part of a grassroots community radio movement, providing an alternative to corporate and public radio.

Until approximately 1995, the F.C.C. largely let micro-radio operators be, unless there were complaints of interference with existing stations. *See* Walker, "Rebel Radio: The F.C.C.'s Absurd New Crusade," *The New Republic*, March 9, 1998, pp. 10-11. However, in recent years, the F.C.C. has dramatically stepped up enforcement against micro-radio broadcasters. *Id*. As the instant case demonstrates, the F.C.C. now goes after even those broadcasters who do not interfere with existing stations

or cause any harm to licensed broadcasters or others. Neset and many others like him have attempted to challenge the F.C.C.'s policies as a violation of the First Amendment's guarantee of free speech.

C. Proceedings Below

The current controversy arose in September 1997 when the station manager of Tioga's one and only radio station contacted the F.C.C. in Minneapolis and complained that Neset was operating an unlicensed radio station in the area. A-3. On September 23, 1997, F.C.C. engineer Frank Evans sent Neset a letter warning him of the Communication Act's radio broadcast licensing requirements and the penalties for operating without a license. *Id.* Neset responded in writing stating that he could not obtain a license because the F.C.C. no longer issued licenses for low-power radio stations and argued that his First Amendment rights were at stake. *Id.* Evans subsequently went to Tioga on two separate occasions to monitor Neset's broadcasts. A-3 – A-4. The United States then filed an action in Federal District Court for declaratory and injunctive relief seeking to enjoin Neset from broadcasting without a license pursuant to 47 U.S.C. § 401(a). A-4. In his answer, Neset admitted to broadcasting, but raised, *inter alia*, a First Amendment defense, arguing that the F.C.C. regulations prohibiting the type of broadcasts he wished to make violated his free speech rights and those of others who listen to his broadcasts. A-4 – A-5.

Holding that Neset did not have standing to raise a First Amendment defense because he had never applied

for a radio license or waiver, the District Court granted the Government's motion for summary judgment and enjoined Neset from broadcasting. *United States v. Neset*, 10 F. Supp.2d 1113 (D.N.D. 1998), reprinted in the Appendix at A-16 – A-26.

Neset appealed the District Court decision to the U.S. Court of Appeals for the Eighth Circuit, claiming that he was entitled to raise his constitutional defenses in the District Court as part of the enforcement proceeding and that the District Court erred in requiring him to apply to the F.C.C. for a license or request a waiver (an issue Neset characterized as exhaustion of remedies rather than standing) because it would have been futile to do so given the F.C.C.'s policy of not issuing low-power licenses. A-10 – A-11. The Eighth Circuit ruled that Neset could not raise constitutional defenses in the District Court (because the District Court lacked subject matter jurisdiction to consider them) and upheld the District Court's permanent injunction. *United States v. Neset*, 235 F.3d 415 (8th Cir. 2000), reprinted in the Appendix at A-1 – A-15. Neset filed a timely Petition for Rehearing and for Rehearing en Banc, which the Eight Circuit denied on March 15, 2001. A-27. Judge Richard S. Arnold, Judge Loken, Judge Morris Sheppard Arnold, and Judge Bye would have granted the Petition. *Id.* Neset now files the instant petition with this Court.

REASONS FOR GRANTING WRIT

I. A DIRECT SPLIT IN AUTHORITY THAT ONLY THIS COURT CAN RESOLVE EXISTS OVER WHICH COURT SHOULD HEAR CONSTITUTIONAL DEFENSES IN A COMMUNICATIONS ACT ENFORCEMENT ACTION INITIATED BY THE UNITED STATES GOVERNMENT.

The issue presented is whether federal district courts have jurisdiction to consider the constitutionality of F.C.C. regulations in enforcement proceedings brought by the Government under 47 U.S.C. § 401(a). In the similar *Fried III* case, the Eighth Circuit described the issue as "an important one for the statutory scheme created by Congress for the regulation of broadcasting" and for which the panel recognized there is no "precise precedent." *U.S. v. Any and All Radio Station Transmission Equip. (Fried III)*, 207 F.3d 458, 462 (8th Cir. 2000).

Not only is the issue raised in this case an "important one," as the Eighth Circuit recognized, but it arises in the context of a highly unsettled legal landscape in which there is a clear split among circuits. The Second Circuit recently noted the conflict:

> Two courts of appeals have considered the similar question of whether § 504 of the Communications Act, which confers on the district courts jurisdiction to hear in rem forfeiture suits brought by the government against unlicensed broadcasters, *see id.* § 504(a), allows the district courts to consider constitutional challenges to the microbroadcasting regulations when these are asserted as defenses to forfeiture. The Eighth Circuit found such challenges barred on the ground that "[a] defensive attack on the F.C.C.

> regulations is . . . an evasion of the exclusive jurisdiction of the Court of Appeals." *United States v. Any & All Radio Station Transmission Equip. ("Fried III")*, 207 F.3d 458, 463 (8th Cir. 2000). The Sixth Circuit came to the opposite conclusion, reasoning that it was unlikely that Congress intended to deprive defendants in forfeiture actions of the ability to raise constitutional defenses to those actions. *See United States v. Any & All Radio Station Transmission Equip. ("Maquina Musical")*, 204 F.3d 658, 667 (6th Cir. 2000).

Prayze FM v. F.C.C., 214 F.3d 245, 250-51 (2d Cir. 2000).[2]

As the Eighth Circuit held, "[a]lthough *Fried III* involved an in rem forfeiture action under 47 U.S.C. § 501(a), we think its rationale applies as well to actions seeking injunctive relief under 47 U.S.C. § 401(a) [as in *Neset*]." *Neset*, 235 F.3d at 420-21. Thus, the fact that the Eighth Circuit's decision in *Neset* was based on exactly

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[2] While noting the split between the Eighth and Sixth Circuits, the Second Circuit in *Prayze FM* declared that it "need not, however, resolve the jurisdictional issue today." *Prayze FM*, 214 F.3d at 251. The court assumed that it had jurisdiction and went on to the merits, ruling against the micro-broadcaster's First Amendment arguments and granting the F.C.C. a preliminary injunction. The case, however, is not relevant to the issue presented in this petition. The issue here is jurisdiction, which in no way depends on the ultimate merits of either the Petitioner's or the F.C.C.'s claims. Of course, Petitioner disagrees with the Second Circuit on his First Amendment claim, but seeks through this Petition simply to establish his ability to raise a constitutional argument at all, something the Eighth Circuit explicitly disallowed.

the same grounds as its earlier decision in *Fried III* reinforces the existing conflict between the two circuits and even exacerbates it by extending it to a new area of law.

The clear split of authority between the Eighth and Sixth Circuits concerns interpretation of two different statutory provisions regulating telecommunications. Title 47 of the U.S. Code regulates communications via "[t]elegraphs, [t]elephones, and [r]adiotelegraphs." Chapter 5 of Title 47, the Communications Act, governs "[w]ire or [r]adio [c]ommunications." Within Chapter 5 are the competing provisions at issue here. Subchapter IV, entitled "Procedural and Administrative Provisions," governs the administrative review of F.C.C. decisions. 47 U.S.C. §§ 401-416.

The Eighth Circuit based its decision in *Fried III*, which itself forms the basis of the *Neset* decision, on Subchapter IV of the Communications Act, governing F.C.C. procedural and administrative provisions. In particular, the court based its ruling upon 47 U.S.C. § 402. That statutory provision, in conjunction with 28 U.S.C. § 2342, prescribes that actions to "enjoin, set aside, annul, or suspend any order of the Commission" must be brought in the Court of Appeals, which has exclusive jurisdiction over all final orders of the F.C.C.[3] Similarly, in *Neset*, the Eighth Circuit held that any challenge to

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[3] The particular Appellate Court to which a petitioner must apply depends upon the type of F.C.C. action at issue. 47 U.S.C. § 402(b) specifies certain actions that are reviewed by the D.C. Circuit Court of Appeals and others that are reviewed by the circuit court "in which the petitioner resides. . . . " *See* 28 U.S.C. § 2343.

F.C.C. regulations must be heard in the Court of Appeals, whether they are affirmative claims or defenses. *Neset*, 235 F.3d at 421, A-13. It then determined that Neset's constitutional claims constituted a "defensive attack" on the F.C.C.'s licensing regulations, which it characterized as " just as much 'an evasion of the exclusive jurisdiction of the Court of Appeals' " as if Neset had made a " 'preemptive strike by seeking an injunction.' " *Id.* (quoting *Fried III*, 207 F.3d at 463). According to the Eighth Circuit, Neset's remedy would be to apply for a license and request a waiver, then appeal the decision to the Appellate Court, or to institute a rulemaking proceeding with the F.C.C. pursuant to the procedural and administrative provisions of Subchapter IV. *Id.*; *Fried III*, 207 F.3d at 462-63 (describing this position in detail).

In contrast, the Sixth Circuit in *U.S. v. Any and All Radio Transmission Equip.* (*Maquina Musical*), 204 F.3d 658 (6th Cir. 2000), reprinted in the Appendix at A-28 – A-48, based its ruling on Subchapter V of the Act governing both monetary forfeitures and forfeitures of communications devices. For the Government to enforce any type of forfeiture under the Act, it must bring an action for recovery of the forfeiture in a district court, pursuant to 47 U.S.C. § 504(a), which, like 47 U.S.C. § 401(a), vests exclusive jurisdiction in the district court to adjudicate enforcement suits brought by the Government:

> *The forfeitures provided for in this chapter* . . . shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this title, in a civil suit in the name of the United States brought in the

> *district* where the person or carrier has its principal operating office. . . . *[A]ny suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo.*[4]

Focusing its analysis on 47 U.S.C. § 504, the Sixth Circuit in *Maquina Musical* determined that the District Court, not the Appellate Court, is the proper forum for adjudication of a micro-broadcaster's constitutional challenges when the Government institutes a forfeiture action. In *Maquina Musical*, the Court considered two consolidated cases in which the District Courts held that the doctrine of primary jurisdiction barred consideration of micro-broadcasters' constitutional defenses. *Id.*, 204 F.3d at 663-64, A-34 – A-37. Reversing, the Sixth Circuit rejected the District Courts' application of primary jurisdiction and remanded both cases for full adjudication, including consideration of constitutional defenses. Like the Eighth Circuit in *Fried III*, the Sixth Circuit also considered the effect of § 402(a) but held that it was inapplicable because no "final order" of the F.C.C. was at issue:

> Congress presumably could have created a streamlined forfeiture remedy that excluded certain defenses by giving claimants the opportunity to raise those defenses in some other forum. But it did not do so. Forfeiture actions, although normally civil, are quasi-criminal in nature. . . . *We believe that this makes it even less*

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[4] 47 U.S.C. § 504(a) (emphasis added). This provision is fortified by 47 U.S.C. § 505, which provides that venue of all trials brought "for any offense under this chapter" shall be in U.S. District Court.

> *likely that Congress enacted a statute that allows the government to forfeit a person's property while denying the right to defend himself by challenging the legal basis of the government's forfeiture case.*

Id. at 667, A-45. (emphasis added).

Thus, there is a clear and irreconcilable conflict between the Eighth and Sixth Circuits on "an important [issue] for the statutory scheme created by Congress for the regulation of broadcasting" and one in which "[n]o binding authority is a precise precedent," *Fried III*, 207 F.3d at 462. Moreover, because the Eighth Circuit decided Neset's case based on exactly the same grounds as its earlier decision in *Fried III*, the uncertainty and confusion about where constitutional defenses to the Communications Act may be raised has been extended from the realm of forfeiture actions to general injunctive actions to enjoin non-compliance. The Sixth Circuit has held that the District Court, not the Appellate Court, is the proper forum for the adjudication of defenses to a Government action under the Communications Act. The Eighth Circuit has held precisely the opposite. The need for resolution by this Court is critical.[5]

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[5] Last year, the Ninth Circuit ruled against a micro-broadcaster in a suit brought by the Government under 47 U.S.C. § 301, which allows the government to pursue declaratory and injunctive relief against those who violate the Communications Act. *See United States v. Dunifer*, 219 F.3d 1004 (9th Cir. 2000). In holding that the micro-broadcaster could not raise constitutional defenses to the injunctive action, the court relied, in part, on the Eighth Circuit's decision in *Fried III* (while also recognizing the split of authority among the circuits). Importantly, however, the Ninth Circuit declared that it did not reach the separate issue of whether individuals facing

II. THE RULING BELOW CONFLICTS WITH THE STATUTORY LANGUAGE AND HISTORY OF THE COMMUNICATIONS ACT.

Neset is entitled to raise constitutional defenses to the Government's enforcement action in District Court based on 47 U.S.C. § 401(a), which governs Communications Act enforcement proceedings. Under § 401(a), "[t]he district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of" the Communications Act. The statute explicitly grants district courts jurisdiction over enforcement actions and nothing in its language restricts the defenses that can be raised there.

As a special jurisdiction statute, § 401(a) trumps 47 U.S.C. § 402, the statute upon which the Eighth Circuit

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forfeitures under 47 U.S.C. § 402(a), the statutory section at issue in this case, can raise constitutional defenses. *Dunifer*, 219 F.3d at n.6. Indeed, as the court further recognized, it had held in *Dougan v. F.C.C.*, 21 F.3d 1488 (9th Cir. 1994) that at least with respect to monetary forfeitures, a defendant could raise constitutional defenses in District Court. *See Dougan*, 21 F.3d at 1491 (noting that "§ 504(a) vests exclusive jurisdiction in the district courts to hear enforcement suits brought by the government"). The unsettled legal landscape within the Ninth Circuit itself over the ability of individuals to raise constitutional arguments when the Government files suit against them contributes to the need for this Court to resolve this important question.

relied. *See Pleasant Broadcasting Co. v. F.C.C.*, 564 F.2d 496, 501 (D.C. Cir. 1977) (stating that "a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction"); *Assure Competitive Transp., Inc. v. U.S.*, 629 F.2d 467, 471 (7th Cir. 1980). In sum, the "statutory scheme" supports jurisdiction over the First Amendment defense in District Court, not the Appellate Court. Section 401(a) is a special review statute which vests the District Court with full jurisdiction over enforcement actions and entitles Neset to assert all available defenses in that District Court proceeding. Barring him from defending himself there effectively guts the explicit statutory mandate that the district courts have jurisdiction over enforcement actions.

Contrary to the Panel's characterization, Neset is not seeking to make an "end run" around § 402(a), which provides for Appellate Court review of "any order" of the F.C.C. That provision is inapplicable here because the F.C.C. never issued an "order" from which Neset could appeal. The F.C.C. never issued Neset a Notice of Apparent Liability, a Cease and Desist Order, or any other administrative order from which he could appeal. *See* 47 U.S.C. §§ 312(b), 503. Without some administrative action by the F.C.C., Neset has no "order" to appeal.

In addition, the F.C.C. regulatory scheme disallowing micro-broadcasting does not constitute an appealable "order" under § 402(a). Neset cannot unilaterally challenge the F.C.C.'s regulatory scheme under that statute, absent the F.C.C.'s initiating an administrative action, which it has not done. Further, § 402(a) prescribes that any proceeding to challenge an F.C.C. order not specifically identified in § 402(b) is governed by 28 U.S.C.

§ 2342. Under 28 U.S.C. § 2342(1), Appellate Courts have exclusive jurisdiction to set aside "all final orders" of the F.C.C. That measure does not give the Appellate Court jurisdiction to determine the validity of "all rules, regulations, or final orders" of the F.C.C. the way it does for rules of the Secretary of Transportation, the Federal Maritime Commission, and the Surface Transportation Board. 28 U.S.C. § 2342(3) and (5). If the statute encompassed Appellate review of F.C.C. rules and regulations, it would so state. The narrow language of "final orders," when contrasted with the broader view the same statute specifies for other agency actions, indicates that Congress did not intend it to govern review of F.C.C. rules and regulations; and that is also consistent with § 504's language and history.

Because there is no "final order," or even any "order" at all for that matter, Neset has nothing to appeal to the Court of Appeals. The sole forum available for any remedy on his part is the District Court. That forum, under § 401(a), has jurisdiction over enforcement actions, entitling Neset to assert all available claims and defenses to the enforcement action there.

III. THE RULING BELOW DEPARTS FROM ESTABLISHED FEDERAL JURISDICTION AND STANDING PRINCIPLES WHEN A PARTY FACES AN ENFORCEMENT ACTION BROUGHT BY THE GOVERNMENT.

As set forth above, a careful reading of the statutes in this case indicate that District Courts have the authority to hear all available claims and defenses in enforcement

proceedings under the Communications Act. In addition, general principles of federal jurisdiction and standing indicate that jurisdiction in a District Court contemplates submission of pleadings by the complaining party and defenses by the party being sued. Jurisdiction in the District Court encompasses jurisdiction over both the causes of action *and* any defenses to them, unless, as mentioned above, Congress has specifically provided another forum for the entire case.

It is vitally important to remember that Neset came before the district court as the *defendant* in an enforcement action brought by the Government. A leading text on federal jurisdiction puts the issue of his ability to raise defenses in proper context: "Defendants in enforcement proceedings, threatened with the imposition of state force, clearly face injury. . . . Defendants may, *of course*, assert *any* claimed violation of their own rights. . . . " HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 187 (4th ed. 1996). This principle, that defendants may *of course* assert their own rights, stands so clear that the only real body of case law on the issue of defendants' ability to raise defenses concerns their standing to assert the rights of others, *see, e.g., Craig v. Boren*, 429 U.S. 190 (1976), an issue not presented in the instant matter. As Judge Morris Sheppard Arnold stated with incredulity in his dissent in *U.S. v. Any and All Radio Station Transmission Equip. (Fried II)*, 169 F.3d 548 (8th Cir. 1999), "Until today I had not supposed that anyone could plausibly maintain that any court of the United States, properly seized of jurisdiction of a suit, did not also have jurisdiction to consider constitutional defenses to that suit."

The Eighth Circuit's decision below suggests that micro-broadcasters like Neset are trying to avoid the jurisdictional requirement of bringing constitutional challenges in the correct forum by waiting for enforcement and then using these constitutional issues as defenses. *See* A-13. This understanding is incorrect. To challenge a law or regulation, individuals generally have to wait until they have been the subject of a prosecution or threatened with prosecution before challenging the law. Otherwise, they will not have standing.

For instance, when micro-broadcasters tried to initiate a challenge to the constitutionality of a future forfeiture action against them (properly brought in district court), the court held that the issue was not ripe and that the radio station had no standing because the F.C.C. agent had only verbally threatened them once. *See Free Speech v. Reno*, 1999 U.S. Dist. LEXIS 3058 (S.D.N.Y. Mar. 8, 1999). Raising constitutional defenses to civil and criminal actions by the government is so common that citations are unnecessary. General principles of federal jurisdiction and standing law clearly indicate that Neset may properly raise defenses in the context of an enforcement action.

The F.C.C. initiated this action against Neset. The F.C.C., not Neset, chose a federal court proceeding as the place to determine his rights. Neset raised his arguments as constitutional defenses, not as part of an original action against the F.C.C. Under the Eighth Circuit's interpretation of the law, government agencies could enforce unconstitutional statutes and rules with impunity. Defendants under these actions would not be able to raise unconstitutionality as a defense; instead they would be

required to request a change in the law. Petitioning for a change in the law is obviously no substitute for enforcement of one's constitutional rights in court, and, not surprisingly, the Eighth Circuit cited virtually no cases in support of its contrary understanding.

The absurdity of the Eighth Circuit's reasoning can be illustrated by a hypothetical: Suppose that ten years ago, the F.C.C. had devised a different licensing scheme, now imposed by regulation, under which it issues licenses only to those stations that broadcast content of which it approves. There are licenses for classical music stations, Top 40 Pop stations, and mainstream political and news programming. While there is no official prohibition on, for example, mixed format programming, Japanese language stations, or fringe political programming, there also are no licenses available for that type of programming. Would-be broadcasters' only option is to apply for a waiver that has no definite time schedule, or to petition for a rulemaking. This scheme would unquestionably violate the First Amendment, but under the Eighth Circuit's holding, it would take several years of administrative proceedings before the case could even get to court. The effect of the Eighth Circuit's ruling in this case is to insulate F.C.C. regulations from constitutional scrutiny and to protect the agency's ability to enforce even blatantly unconstitutional regulations.

IV. BOTH FIRST AMENDMENT RIGHTS AND IMPORTANT POLICY CONSIDERATIONS HANG IN THE BALANCE OF THE UNDECIDED QUESTION OF WHERE DEFENDANTS MAY RAISE THEIR CONSTITUTIONAL DEFENSES TO COMMUNICATIONS ACT ENFORCEMENT ACTIONS.

The policy reasons the Eighth Circuit has cited as supporting appellate review as opposed to district court review of defenses to enforcement actions are unavailing. *See Fried III*, 207 F.3d at 463. The Sixth Circuit explicitly rejected the desire to ensure review based upon an administrative record as a legitimate rationale for appellate review, holding that because the agency itself instituted the action "it makes little sense to refer the very question at issue to the agency." *Maquina Musical*, 204 F.3d at 664, A-38 – A-39 (quoting *C.A.B. v. Aeromatic Travel Corp.*, 489 F.2d 251, 254 (2d Cir. 1973)).

Allowing Neset to assert his constitutional defenses in the District Court will not undermine a desirable uniformity of decision-making. Holding that raising a constitutional defense in the District Court proceeding is appropriate would be consistent with the majority of cases decided by the Federal tribunals, and, most recently, the Sixth Circuit. Finally, the aspiration of having agency "expertise" is not applicable here since district courts have the appropriate expertise to examine constitutional issues.

While raising a number of unfounded policy considerations in ruling against the micro-broadcaster, the Eighth Circuit unfortunately did not recognize that vital First Amendment rights are at stake in this case and

similar micro-radio cases throughout the country. First Amendment rights are at the heart of the instant case, making it and the ultimate resolution thereof of crucial importance. Because of the injunction authorized by the courts in this case, Neset's station has been silenced. He has been deprived of his First Amendment right to broadcast, and his listeners have been deprived of information and artistic expression.

In *F.C.C. v. League of Women Voters*, 468 U.S. 364, 378 (1984), this Court held that "broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." *See also Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) (stating that "[i]t is the purpose of the First Amendment to reserve an uninhibited marketplace of ideas. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas . . . [and] [t]hat right may not constitutionally be abridged either by Congress or the F.C.C."). This Court has established a "middle-tier" scrutiny test for the regulation of broadcasting. Such regulations must be "narrowly tailored to further a substantial governmental interest." *F.C.C. v. League of Women Voters*, 468 U.S. at 380. If Neset is allowed to raise his constitutional defenses, he will argue to the district court that the F.C.C.'s prohibition of micro-radio and his related prosecution fail to meet this exacting standard.

Unquestionably, the issue of where a micro-broadcaster can raise defenses to a Government action is a critical one. Throughout the nation the Government has brought enforcement actions against small broadcasters like Neset. Their broadcasts may vary from religious programming to alternative music formats, but they have one thing in common: they do not know where to defend themselves, and, consequently, often find themselves defenseless. The Government chose to pursue Neset in District Court, pursuant to 47 U.S.C. § 401(a), but the court told Neset that he could not fully defend himself there. Preventing Neset and others like him from raising their constitutional defenses to an F.C.C. action against them in the district court forum where the action is brought effectively silences them. Small broadcasters lack the resources, including expensive lobbyists and lawyers, to bring cases in Washington, D.C. This reality bears on the practical application of the statutory scheme, especially when § 401(a) grants district courts jurisdiction over enforcement actions. To prevent Neset and other micro-broadcasters from raising their defenses in the district courts in which enforcement actions are initiated against them would inflict manifest injustice, allowing the F.C.C. to suppress speech without providing citizens an opportunity to test the constitutional limits of the Government's power in an appropriate forum.

CONCLUSION

The circuits have created a clear and irreconcilable split on the issue presented in this Petition. The issue is of vital importance both to micro-radio broadcasters who

find their First Amendment rights abridged and to the "statutory scheme created by Congress for the regulation of broadcasting." *Fried III*, 207 F.3d at 462. For these reasons, Petitioner respectfully urges this Court to grant the Petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United States of America, Appellee, v. Roy Neset, Appellant.

No. 98-3539

235 F.3d 415; 2000 U.S. App. LEXIS 29714

May 12, 1999, Submitted
November 28, 2000, Filed

SUBSEQUENT HISTORY: Rehearing En Banc and Rehearing Denied March 15, 2001, Reported at: 2001 U.S. App. LEXIS 5559.

PRIOR HISTORY: Appeal from the United States District Court for the District of North Dakota. Honorable Patrick Conmy.

DISPOSITION: Affirmed.

COUNSEL: Counsel who presented argument on behalf of the appellant was Scott G. Bullock of Washington, D.C. William H. Mellor and Clint Bolick of Washington, D.C. appeared on the brief. Lawrence Bencer of Bismarck, ND appeared on the brief.

Counsel who presented argument on behalf of the appellee was Jacob M. Lewis of the Dept. of Justice, Washington, D.C. Robert S. Greenspan of the Dept. of Justice appeared on the brief.

JUDGES: Before McMILLIAN, HEANEY and FAGG, Circuit Judges. HEANEY, Circuit Judge, dissenting.

OPINION BY: McMILLIAN

OPINION:

McMILLIAN, Circuit Judge.

Roy Neset appeals from a final order entered in the District Court[1] for the District of North Dakota granting declaratory and injunctive relief in favor of the United States (the government), acting on behalf of the Federal Communications Commission (FCC). *United States v. Neset*, 10 F. Supp. 2d 1113 (D.N.D. 1998). For reversal, Neset argues that the district court erred in (1) finding that he lacked standing to raise his First Amendment defenses, (2) requiring him to exhaust administrative remedies before he could raise his First Amendment defenses, and (3) applying the doctrine of primary jurisdiction to preclude him from raising his statutory defenses. For the reasons discussed below, we affirm the judgment of the district court.

The government asserted that the district court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1345, and 47 U.S.C. § 401(a) (civil applications to enjoin violations of Communications Act of 1934). This court has appellate jurisdiction under 28 U.S.C. § 1291. Neset filed a timely notice of appeal under Fed. R. App. P. 4(a)(1)(B).

The facts in the present case are not disputed. Neset is a farmer in Tioga, North Dakota, a small town in the upper northwest corner of the state. Tioga's only radio station, KTGO, broadcasts country music. Neset likes to

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[1] The Honorable Patrick A. Conmy, United States District Judge for the District of North Dakota.

listen to talk radio and received permission from a Colorado radio station to broadcast that station's talk and news programming. Neset used a one-watt transmitter with a 30-watt amplifier to broadcast primarily over his own property, that is, from his house to his tractor while working in his fields. The signal could be heard at a range of about 5 miles from Neset's property. About 8-10 other individuals also listened to his broadcasts. The signal did not interfere with any other broadcasts or stations or threaten public safety.

Except for certain special broadcasts and extremely low-power broadcasts, it is unlawful to transmit radio signals within the United States without a license or waiver from the FCC. *See* 47 U.S.C. § 301. In September 1997 the station manager of KTGO complained to the FCC that Neset was operating an unlicensed radio station in the Tioga area on a frequency of approximately 88.1 mhz. FCC engineer Frank Evans investigated the complaint and sent Neset a letter advising him of the Communications Act's radio broadcast licensing requirements and the penalties for unlicensed operation. Neset replied by letter. He admitted making unlicensed radio broadcasts, but asserted that his First Amendment rights were at stake and that he could not obtain a license because the FCC no longer issued licenses for low-power radio broadcasts.

In October 1997, Evans traveled to Tioga and measured the field intensity of Neset's radio broadcasting signal. The signal significantly exceeded the maximum intensity allowable under FCC regulations for unlicensed broadcasting. *See* 47 C.F.R. § 15.239(b) (88-108 mhz FM transmissions not exceeding 250 micro-volts per meter at

distance of 3 meters). In late November 1997 Neset stopped broadcasting for about 10 days, but then resumed broadcasting on a different frequency (88.3 mhz). In March 1998 Evans returned to Tioga to measure the field intensity of the radio transmissions coming from Neset's property. He again found that the signal significantly exceeded the maximum intensity allowable under the regulations.

In March 1998, the government brought this action against Neset in federal district court for declaratory and injunctive relief. The government sought to enjoin Neset from making radio transmissions without a license or a waiver in violation of 47 U.S.C. § 301. *See* 47 U.S.C. § 401(a) (civil action to enjoin noncompliance). In his answer, Neset admitted making the radio transmissions and that he had not applied to the FCC for a radio broadcast license or a waiver. However, he asserted several affirmative defenses raising constitutional and other challenges to the FCC microbroadcasting regulations. The district court consolidated the preliminary and permanent injunction proceedings.

First, Neset argued that the FCC microbroadcasting regulations are invalid because the FCC failed to comply with the Paperwork Reduction Act or the Administrative Procedures Act. The district court found that it did not have subject matter jurisdiction over these statutory violation defenses because the doctrine of primary jurisdiction required that Neset first challenge an FCC policy or practice before the FCC and then seek judicial review exclusively in the courts of appeals. *See Neset*, 10 F. Supp. 2d at 1114-15.

Neset also argued that the FCC microbroadcasting regulations are unconstitutional and violated his free speech rights and those of others who listen to his broadcasts. Neset relied upon a recent decision from the Northern District of California in which a microbroadcaster raised similar affirmative defenses challenging the constitutionality of the microbroadcasting regulations. *See United States v. Dunifer*, 997 F. Supp. 1235 (N.D. Cal. 1998), aff'd on other grounds, 219 F.3d 1004, 1007-09 (9th Cir. 2000) (holding district court lacked subject matter jurisdiction under applicable statutory framework to decide microbroadcaster's constitutional challenges to licensing regulations). Neset argued that the regulations were overbroad, were not narrowly tailored to further the government's interests in preserving the available broadcast spectrum or preventing signal interference, and interfered with the First Amendment rights of his listeners to receive valuable information. The district court adopted the Ninth Circuit's view that a defendant must establish standing to assert an affirmative defense. *See* 10 F. Supp. 2d at 1116 ("In raising an affirmative defense, a defendant is seeking the jurisdiction of the court to hear its claims as much as a plaintiff and, therefore, standing becomes an issue for the defendant as well.") (citing Ninth Circuit cases). But *see Wynn v. Carey*, 599 F.2d 193, 196 (7th Cir. 1979) (holding standing applies only to plaintiffs). The district court also found persuasive the Dunifer court's constitutional analysis and decided that, like Dunifer, Neset lacked standing to raise his constitutional defenses because he had not applied for a radio broadcast license or a waiver and thus the regulations have never been applied to him. *See* 10 F. Supp. 2d at

1115-16 (thus failing to show causal connection between injury and conduct of which complained); *Dunifer*, 997 F. Supp. at 1240, 1242, 1243-44.

The district court then found that Neset violated the license requirement of 47 U.S.C. § 301. *See* 10 F. Supp. 2d at 1116. Neset admitted that he was responsible for unlicensed radio transmissions on 88.1 mhz in October 1997 and on 88.3 mhz in March 1998. The record showed that he continued to broadcast after being notified of the violation. The district court rejected his asserted defenses. The district court enjoined Neset and all persons in active concert or participation with him from making radio transmissions within the United States without first obtaining a license or other appropriate authorization (such as a waiver) from the FCC. *See id.* at 1116-17 (noting that violation of law supports finding of irreparable injury and no adequate remedy at law exists). The district court subsequently denied Neset's motion to alter or amend the judgment. This appeal followed.

During the pendency of this appeal, the FCC essentially reversed its position on microbroadcasting and adopted rules authorizing the licensing of two new classes of non-commercial FM radio stations, one operating at a maximum power of 100 watts and one at a maximum power of 10 watts. *See In re Creation of Low Power Radio Service*, 15 FCC Rcd 2205, FCC 00-19, MM Docket No. 99-25, 65 Fed. Reg. 7616, 2000 WL 85304, at P1 (released Jan. 27, 2000) (to be codified at 47 C.F.R. pts. 11, 73, 74). Under the new regulations the FCC will issue licenses to microbroadcasters to operate low-power FM stations. However, it is not clear whether former unlicensed microbroadcasters like Neset will be eligible

for a low-power broadcasting license under the new regulations. *See id.* at ¶¶ 51-55 (rejecting amnesty for unlicensed broadcasters and announcing acceptance of applicants who, if at some time in the past they broadcast illegally, certify that they voluntarily ceased broadcasting illegally no later than Feb. 26, 1999, without specific directions to terminate by the FCC, or they ceased broadcasting illegally within 24 hours of being advised by the FCC to do so). *See United States v. Any & All Radio Station Transmission Equipment*, 204 F.3d 658, 662 (6th Cir. 2000) (*Strawcutter*) (noting FCC change in position on microbroadcasting).

In addition, this court struggled with and finally resolved similar difficult jurisdictional issues in an unrelated enforcement action brought by the government against another unlicensed microbroadcaster. *See United States v. Any & All Radio Station Transmission Equipment*, 976 F. Supp. 1255 (D. Minn. 1997) (*Fried I*), *aff'd*, 207 F.3d 458 (8th Cir. filed Mar. 27, 2000) (*Fried III*) (on rehearing by the panel) (the initial panel opinion was reported at 169 F.3d 548 (filed Feb. 26, 1999) (*Fried II*)). Unlike the present case which is a civil action for declaratory and injunctive relief under 47 U.S.C. 401(a), *Fried* was an *in rem* forfeiture action under 47 U.S.C. § 510(a).[2] The government sought to seize and forfeit the broadcast equipment that Fried used to operate an unlicensed radio

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[2] The FCC has several enforcement options: criminal prosecution under 47 U.S.C. § 501, a civil action to enjoin noncompliance under *id.* § 401(a), monetary forfeitures to penalize violations under *id.* § 503, and seizure and forfeiture of radio equipment under *id.* § 510(a).

station, out of his apartment in downtown Minneapolis, Minnesota. Like Neset, Fried had never applied for a license, although he maintained that he had requested a waiver (and the district court assumed for purposes of analysis that he had). Following a complaint from a licensed FM radio station, FCC agents investigated and confirmed unauthorized radio transmissions from Fried's apartment. In August 1996 the FCC mailed a warning letter to Fried. He responded to the warning letter by challenging the constitutionality of the microbroadcasting regulations and requesting a waiver of the licensing requirements, but he did not cease broadcasting.

Rather than seeking an injunction as it did in the present case, the government in Fried instead filed an in rem forfeiture action. Fried in his answer raised several affirmative defenses challenging the constitutionality of the microbroadcasting regulations. The government argued that the court of appeals, not the district court, had exclusive jurisdiction to determine the validity of the microbroadcasting regulations, citing 47 U.S.C. § 402(a) (referencing 28 U.S.C. § 2342, which provides in part that the court of appeals has exclusive jurisdiction to determine the validity of all final orders of the FCC made reviewable by 47 U.S.C. § 402(a)). Fried argued that the district court, not the court of appeals, had exclusive jurisdiction over the forfeiture action, including his affirmative defenses challenging the constitutionality of the microbroadcasting regulations, because the specific jurisdictional grant over forfeiture actions, 47 U.S.C. § 504(a), provides for trial de novo in the district court, a reference which he argued contemplated adjudication of all issues

raised in the forfeiture action, including any and all defenses to forfeiture.

We initially agreed with Fried and held that the district court was the exclusive forum for review of in rem forfeiture orders. *See Fried II*, 169 F.3d at 552 (McMillian, J.), citing *Dougan v. FCC*, 21 F.3d 1488, 1491 (9th Cir. 1994) (holding 47 U.S.C. § 504(a) is a specific review statute which vests exclusive jurisdiction over forfeiture actions in district court and cuts off general jurisdiction in courts of appeals under 47 U.S.C. § 402(a) to review FCC orders). We also held that the district court had jurisdiction to consider Fried's affirmative constitutional defenses. *See id.* 169 F.3d at 553, citing *Dunifer*, 997 F. Supp. at 1238. However, we later granted rehearing, 182 F.3d 1026 (8th Cir. 1999), and, upon reconsideration, held that the district court has exclusive jurisdiction to adjudicate the in rem forfeiture action, but not Fried's constitutional challenges to the microbroadcasting regulations; Fried's defenses exclusively focused on the validity of the microbroadcasting regulations, and 47 U.S.C. § 402(a) and 28 U.S.C. § 2342 clearly confined the review of the validity of FCC regulations to the courts of appeals, not the district courts. We held that "[a] defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." *Fried III*, 207 F.3d at 463 (Noonan, J.), citing *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468, 80 L. Ed. 2d 480, 104 S. Ct. 1936 (1984) (ITT) (holding exclusive jurisdiction of the courts of appeals over rulemaking by the FCC may not be evaded by seeking to enjoin a final order of the FCC in the district court), and *Southwestern Bell Telephone v.*

Arkansas Public Service, 738 F.2d 901, 906 (8th Cir. 1984) ("Where exclusive jurisdiction is mandated by statute, a party cannot bypass the procedure by characterizing its position as a defense to an enforcement action."), vacated and remanded on other grounds, 476 U.S. 1167 (1986). But *see Strawcutter*, 204 F.3d at 667 (holding that district court had jurisdiction to adjudicate constitutional defenses in forfeiture action) *Dougan v. FCC*, 21 F.3d at 1490-91 (holding court of appeals lacked jurisdiction over monetary forfeiture action); *United States v. Any & All Radio Station Equipment*, 93 F. Supp. 2d 414, 417-22 (S.D.N.Y. 2000) (rejecting statutory and constitutional defenses raised by microbroadcaster defendant in forfeiture action, including Religious Freedom Restoration Act and First, Fourth and Fifth Amendments); *see* also *Prayze FM v. FCC*, 214 F.3d 245, 250-53 (2d Cir. 2000) (noting jurisdictional question without resolving it; court assumed district court had jurisdiction to hear microbroadcaster's First Amendment challenges in § 401(a) injunction action because FCC sufficiently demonstrated that it would likely prevail).

For reversal, Neset argues that the district court erred in holding that he lacked standing to raise a constitutional claim. Neset argues that he has been directly injured because he has been enjoined from broadcasting. In his view, the issue is not standing but rather exhaustion of administrative remedies. Neset argues that the district court erred in requiring him to exhaust his administrative remedies (by applying to the FCC for a license, requesting a waiver or petitioning for a change in the regulations) because it would have been futile to do so. Neset argues that, at the time he was broadcasting without a license, the FCC was simply not issuing any low-

power licenses and had only granted two waivers since 1978 (one in Alaska and one in a remote part of New Mexico). Neset also argues that, assuming exhaustion of administrative remedies is required, the district court should have dismissed the government's action and ordered the FCC to issue a cease and desist order before seeking injunctive relief, thus invoking the doctrine of primary jurisdiction.

The government argues that Neset's constitutional attack on the microbroadcasting regulations is not a defense to this 47 U.S.C. § 401(a) action seeking to enjoin him from broadcasting without a license or a waiver. This argument is similar to its argument in *Fried* that the district court did not have jurisdiction to adjudicate affirmative constitutional defenses in a 47 U.S.C. § 510(a) in rem forfeiture action. *See* Brief for Appellee at 16-23. The government argues that, even assuming for purposes of analysis that Neset's constitutional attack is a defense in this action for injunctive relief, Neset should instead seek administrative relief by applying for a license or a waiver or by petitioning the FCC to institute rulemaking procedures to amend the microbroadcasting regulations, and then, if administrative relief is denied, by seeking judicial review in the courts of appeals. *See id.* at 19. The government also argues that, because Neset has not applied for a license or sought a waiver or petitioned the FCC to change the microbroadcasting regulations, he lacked standing to challenge the microbroadcasting regulations. *See id.* at 20-21. The government also argues that exhaustion of administrative remedies would not be futile. *See id.* at 22. Finally, the government argues on the merits that Neset has no First Amendment free speech right to

broadcast radio transmissions without a license or a waiver and that his listeners have no First Amendment free speech right to listen to radio transmissions broadcasted without a license or a waiver.

We do not reach the standing issues[3] because we hold that under the statutory scheme the district court lacked

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[3] In order to establish standing and invoke federal jurisdiction, a litigant must allege an actual and concrete injury consisting of an invasion of a legally protected interest, a causal connection between the injury and the conduct of which the litigant complains, and the likelihood that the injury will be redressed by a favorable judicial decision. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Because Neset has not applied for a license or requested a waiver, the microbroadcasting regulations then in effect have not been applied to him, and he cannot show a causal connection between the alleged violation of his First Amendment rights and the FCC's failure to issue low-power broadcast license or grant him a waiver. *See Prayze FM v. United States*, 83 F. Supp. 2d 293, 295 (D. Conn. 1999) (holding plaintiff microbroadcaster lacked standing to challenge regulations because it had not applied for a license or waiver), aff'd sub nom. *Prayze FM v. FCC*, 214 F.3d 245, 251-53 (2d Cir. 2000) (holding microbroadcaster lacked standing to bring as-applied challenge but did have standing to bring facial challenge); *United States v. Dunifer*, 997 F. Supp. 1235, 1240 (N.D. Cal 1998) (holding defendant microbroadcaster lacked standing to challenge regulations because he had not applied for a license or waiver), aff'd on other grounds, 219 F.3d 1004 (9th Cir. 2000); *see* also *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 65 (2d Cir. 1999) (per curiam) (holding plaintiff microbroadcasters lacked standing to challenge FCC's authority to issue cease and desist order absent allegation that FCC's exercise of that authority caused them any actual injury or to challenge FCC's authority to initiate forfeiture proceedings absent allegation that FCC had initiated forfeiture proceeding against them or that it had seized any of their property). [**19]

subject matter jurisdiction over Neset's affirmative defenses attacking the validity of the microbroadcasting regulations. Although *Fried III* involved an in rem forfeiture action under 47 U.S.C. § 510(a), we think its rationale applies as well to actions seeking injunctive relief under 47 U.S.C. § 401(a). *See Dunifer*, 219 F.3d at 1007 (applying reasoning in *Fried III* to § 401(a) injunction action). But cf. *Prayze FM v. FCC*, 214 F.3d at 250 (assuming district court had jurisdiction to hear microbroadcaster's constitutional challenges in § 401(a) injunction action). As we noted in *Fried III*, "the Supreme Court has authoritatively determined that the exclusive jurisdiction of the Court of Appeals over rulemaking by the FCC may not be evaded by seeking to enjoin a final order of the FCC in the district court." 207 F.3d at 463, citing *ITT*, 466 U.S. at 468. *Fried III* expressly extended the statutory mandate of exclusive jurisdiction from offensive claims to affirmative defenses. *Id.*, citing *Southwestern Bell Telephone v. Arkansas Public Service*, 738 F.2d at 906 ("Where exclusive jurisdiction is mandated by statute, a party cannot bypass the procedure by characterizing its position as a defense to an enforcement action."). Neset's defensive attack on the validity of the microbroadcasting regulations would be just as much "an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." *Fried III*, 207 F.3d at 463. For that reason, we hold that the district court lacked subject matter jurisdiction over Neset's affirmative defenses attacking the validity of the microbroadcasting regulations. We express

no opinion on the merits of Neset's statutory or constitutional defenses.[4]

The district court did have jurisdiction over the § 401(a) injunction action. We hold that the district court did not abuse its discretion in permanently enjoining Neset from broadcasting without a license. The record established that Neset was broadcasting without a license or a waiver in violation of the Communications Act, as amended. Accordingly, the judgment of the district court is affirmed.

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[4] Several recent decisions have rejected similar constitutional arguments raised by other microbroadcasters on the ground that the First Amendment right to free speech does not include either the right to broadcast radio transmissions without a license or a waiver or the right to listen to radio transmissions broadcast without a license or a waiver. *See United States v. Any & All Radio Station Transmission Equip.*, 204 F.3d 658, 665-68 (6th Cir. 2000) (*Strawcutter*); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64-65 (2d Cir. 1999) (per curiam); *United States v. Any & All Radio Station Transmission Equip.*, 93 F. Supp. 2d 414, 420-21 (S.D.N.Y. 2000); *see* also *National Broad. Co. v. United States*, 319 U.S. 190, 227, 87 L. Ed. 1344, 63 S. Ct. 997 (1943) ("The right of free speech does not include . . . the right to use the facilities of radio without a license."). The Sixth Circuit in *Strawcutter* rejected application of the doctrine of primary jurisdiction. *See* 204 F.3d at 664 (holding that doctrine of primary jurisdiction, which arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency, does not apply when the specially competent agency is itself the plaintiff) (citing *United States v. Alcon Labs.*, 636 F.2d 876, 888 (1st Cir.) (noting "deference to an agency's primary jurisdiction makes little sense in the context of an enforcement proceeding initiated by the agency"), cert. denied, 451 U.S. 1017, 69 L. Ed. 2d 388, 101 S. Ct. 3005 (1981)).

DISSENT BY: HEANEY

DISSENT:

HEANEY, Circuit Judge, dissenting.

I agree with the Sixth Circuit's decision in *United States v. Any & All Radio Station Transmission Equip.*, 204 F.3d 658 (6th Cir. 2000) (*Strawcutter*), that the district courts in this type of case have jurisdiction to hear First Amendment challenges to the Federal Communication Commission's prohibition of microbroadcasting in the context of an enforcement action filed against them. Accordingly, I would remand to the district court for further proceedings.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, NORTHWESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,
vs. ROY NESET, Defendant.

Civil No.: A4-98-028

10 F. Supp. 2d 1113; 1998 U.S. Dist. LEXIS 10178

June 24, 1998, Decided
June 24, 1998, Filed

DISPOSITION: Plaintiff's request for declaratory relief and injunctive relief GRANTED; Defendant's motions for judgment on pleadings or for summary judgment (Docket # s 18 & 19) and motion for leave to file reply brief (Docket # 24) DENIED; Plaintiff's motion to supplement memorandum of law (Docket # 25) GRANTED.

COUNSEL: For USA, plaintiff: Shon Hastings, U.S. ATTORNEY'S OFFICE, FARGO, ND.

For ROY NESET, defendant: Lawrence Bender, Pearce & Durick, Bismarck, ND.

JUDGES: Patrick A. Conmy, District Judge.

OPINION BY: Patrick A. Conmy

OPINION: ORDER

Pursuant to the court's Order of May 8, 1998, this matter is before the court for a determination on the merits of the plaintiff's request for declaratory and injunctive relief.

I. FACTUAL BACKGROUND

By this action, the plaintiff seeks a determination that the defendant has caused unlicensed radio transmissions to occur in violation of FCC licensing regulations, that the low-power radio transmissions made by the defendant require a license and that the defendant, and "all persons in active concert or participation with [the defendant]" be enjoined from making radio transmission until properly licensed. *COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, USA v. Neset*, Civil No. A4-98-028, Docket # 1.

On the record before the court, the defendant has admitted he is responsible for unlicensed transmissions on 88.1 MHZ which occurred on October 21, 1997, and March, 1998, unlicensed transmissions on 88.3 MHZ. ANSWER OF DEFENDANT, ROY NESET, Civil No. A4-98-028 at Docket # 16, ¶ 11. By Affidavit and by testimony at the hearing held on May 6, 1998, Resident Agent Francis M. Evans, an electronics engineer with the FCC, the plaintiff has demonstrated that the transmissions exceeded 250 micro-volts per meter at a distance of three meters from the transmitting antenna as measured by a field intensity measuring system, and therefore a license for such transmission would have been required. AFFIDAVIT OF FRANCIS M. EVANS, Civil No. A4-98-028 at Docket # 4, ¶ 11. The defendant has admitted that he has not applied to the FCC for a radio broadcast license. ANSWER OF DEFENDANT, ROY NESET, Civil No. A4-98-028 at Docket # 16, ¶ 12.

II. DISCUSSION.

The FCC licensing statutes require that a person be licensed before he or she can transmit radio signals within the United States. *See* 47 U.S.C. § 301. Under FCC regulations, however, low-power radio stations operating in the band 88 to 108 megahertz ("MHZ") are exempt from FCC licensing requirements if the field strength of the emissions do not exceed 250 microvolts/meter at a distance of 3 meters. *See* 47 C.F.R. § 15.239(b).

Based upon the evidence and testimony presented to the court as set forth in the proceeding section, the plaintiff has satisfied the requisites for declaratory judgment against the defendant which concludes that the defendant has made low-power radio transmissions in excess of the exemption limits provided by 47 C.F.R. § 15.239(b) so that the defendant is required to have a license in making such radio transmissions, and that the defendant has violated 47 U.S.C. § 301 by making radio transmissions without a license. However, although it cannot be disputed that the defendant has violated the licensing requirement of 47 U.S.C. § 301, he has asserted affirmative defenses which raise constitutional and other challenges to the FCC's regulatory provisions on microbroadcasting.

First, defendant has submitted to the court (1) a motion for judgment on the pleadings or for summary judgment on the grounds that the FCC has failed to comply with the 1995 Paperwork Reduction Act, and (2) a motion for judgment on the pleadings or for summary judgment on the grounds that the FCC has failed to

comply with the Administrative Procedures Act. Defendant's motions are dispositive incarnations of defenses raised by him in his Answer to the Complaint.

Both motions submitted by the defendant claim statutory violations by the FCC in its radio broadcasting licensing operations and practices. The first motion argues that Federal Communications Commission ("FCC") has failed to obtain Office of Management and Budget ("OMB") control numbers for its applicable agency regulations in violation of the 1995 Paperwork Reduction Act, 44 U.S.C. § 3501, *et seq.* Therefore, the defendant posits, the public protection provisions of 44 U.S.C. § 3512 apply, and he is not legally required to obtain a radio transmission license from the FCC. The second motion argues that the FCC application form for obtaining a radio broadcasting license is a "rule" under the Administrative Procedures Act, and it is void because it has never been promulgated and published.

These motions attack FCC policies and practices. Therefore, the motions and the defenses raised therein are subject to the doctrine of primary jurisdiction. The doctrine of primary jurisdiction requires a party who wishes to challenge an FCC policy or practice to do so first through a motion for declaratory ruling with the FCC itself. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 n. 5, 104 S. Ct. 1936, 1939 n. 5, 80 L. Ed. 2d 480 (1984). The Communications Act then gives the Courts of Appeals exclusive jurisdiction to review the FCC's declaratory rulings in those cases, as well, as all policies, practices, and regulations adopted by the FCC. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a); *see ITT*, 466 U.S. at

468, 104 S. Ct. at 1939. Accordingly, this court must conclude that it does not have subject matter jurisdiction over the statutory violation defenses raised by the defendant in his Answer, and furthered by his dispositive motions. Whether or not the FCC application practices violate the statutory provisions of the Paperwork Reduction Act and/or the Administrative Procedures Act is a question best left to the expertise of the FCC and to review by the Court of Appeals. Defendant shall therefore be denied protection under these two defenses.

Second, the defendant has introduced a First Amendment wrinkle into the profile of this case by alleging that the FCC regulations prohibiting micro-radio broadcasts are unconstitutional and violate the free speech rights of himself and others who listen to his broadcasts. The defendant concedes that he does not have a constitutional right to operate a radio station without a license. *See* OPPOSITION TO UNITED STATES OF AMERICA'S REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF, Civil No. A4-98-028, Docket # 17, pg. 1. Defendant argues, however, that (1) by prohibiting micro-radio, the FCC sweeps too broadly in a way not permitted under the First Amendment, (2) that the FCC's prosecution of the defendant and its prohibition of micro-radio are not narrowly tailored to further the government's interests in preserving the available spectrum or preventing interference, and (3) attempts to stop the defendant's broadcasts violate the First Amendment rights of his listeners to receive valuable information. Because of the limited precedent on these issues, the defendant directs the court's attention to a recent case from the Northern District of California entitled *United States v. Dunifer*, 997

F. Supp. 1235 (N.D. Cal. 1998) wherein the defendant, Mr. Stephen Paul Dunifer, raised similar affirmative defenses challenging the constitutionality of FCC regulations governing the licensing of micro-radio broadcasting.

The defendant herein is similarly situated to Mr. Dunifer, in that neither the defendant nor Mr. Dunifer made application for licensing by the FCC prior to making their radio broadcasts. While earlier opinions in the Dunifer litigation[1] support the arguments of this defendant, by an opinion dated June 16, 1998, the Honorable Claudia Wilken, United States District Judge for the Northern District of California, found that because Mr. Dunifer had never applied for a broadcasting license, he did not have standing to challenge the licensing regulations. *See* ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PERMANENT INJUNCTION, *United States v. Dunifer*, 997 F. Supp. 1235, (1998). The California court further determined that Mr. Dunifer lacked standing to assert a challenge to the regulatory scheme on the ground that it is unconstitutional in every conceivable application based on the fact he had never applied for a license. *Id.* Finally,

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[1] The defendant had cited the court to *United States v. Dunifer*, 997 F. Supp. 1235, No. C 94-03542 CW, MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND STAYING THIS ACTION (N.D.Ca., Jan. 30, 1995) and *United States v. Dunifer*, No. C 94-03542 CW, ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITHOUT PREJUDICE AND REQUESTING FURTHER BRIEFING, (N.D. Ca., November 12, 1997), and attached these filings to his brief in opposition.

while the court found that Mr. Dunifer had standing to claim that the regulations are overbroad, his claim failed because the regulatory scheme specifies procedures which the FCC must follow and it provides for judicial review of any improper FCC ruling. *Id.*

In reaching its decision on standing, the California court noted Mr. Dunifer's argument that he need not establish standing because standing must be demonstrated by plaintiffs and not defendants, because it is the plaintiffs who are seeking to invoke federal court jurisdiction. Guiding Judge Wilken in her decision that the standing doctrine also applies to defendants was case law within the Ninth Circuit which analyzed whether defendants have standing to raise, as an affirmative defense, the unconstitutionality of the statute and regulations that form the basis of the government's case-in-chief. *See United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997); *United States v. Thirty Eight (38) Golden Eagles*, 649 F. Supp. 269, 274, 276 (D.Nev. 1986), *aff'd*, 829 F.2d 41 (9th Cir. 1987). Case law within the Eighth Circuit is not particularly instructive on this point. *See*, e.g., *Wood v. Mangum*, 645 F. Supp. 131, 135 (E.D.Ark. 1986) (defendant's assertion that plaintiff's personal and affirmative conduct materially impaired completion of obligation on guaranty agreement and caused injury to the defendant challenged for lack of standing by the plaintiff). Notably, however, the Eighth Circuit has not taken the clear position of the Seventh Circuit that the standing doctrine applies only to plaintiffs. *See Wynn v. Carey*, 599 F.2d 193, 196 (7th Cir. 1979). This court finds that logic of the Ninth Circuit with regard to standing of a defendant cannot be ignored. In raising an affirmative defense, a defendant is

seeking the jurisdiction of the court to hear its claims as much as a plaintiff and, therefore, standing becomes an issue for the defendant as well. Accordingly, the court finds that the defendant must establish standing to assert his constitutional defenses.

Given the striking similarities between this matter and that of the California court, this court finds the reasoning and conclusions of the California court with regard to disposition of Mr. Dunifer's challenges to the constitutionality of FCC regulations governing the licensing of micro-radio broadcasting to be persuasive. Accordingly, the court concludes that defendant's constitutional challenges must fail, and judgment shall issue in favor of the plaintiff.

The court having found that the plaintiff is entitled to declaratory relief, the court turns its attention to whether a permanent injunction should also issue. A permanent injunction will issue if a violation of the statute is established, if continuing irreparable injury will occur without the entry of a permanent injunction, and an adequate remedy at law is lacking. *See*, generally, *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07, 79 S. Ct. 948, 954, 3 L. Ed. 2d 988 (1959). These elements have been satisfied in this regard.

As noted previously, the defendant has admitted that he was making radio transmissions without a license, the court has found that these transmissions were in excess of the exemption limits, and the asserted defenses of the defendant have failed; therefore, a violation has been

established. While the plaintiff argues there is a "presumption" of irreparable injury if a statute has been violated, based upon the Ninth Circuit opinion in *United States v. Nutri-Cology*, 982 F.2d 394, 398 (9th Cir. 1992), this presumption has not been enunciated by the Eighth Circuit, nor has wholesale adoption of this reasoning occurred within other circuits. However, this court agrees that:

> . . . The right of the United States or any agency thereof to obtain an injunction provided for by statute stands upon a different footing than a private party's right thereto, the distinction being that instead of procedural mechanism for the protection of private rights, the statutory injunction is for the purpose of effectuating Congressional policy and vindicating public rights. . . .

United States v. Beatty, 88 F. Supp. 646, 651 (S.D.Iowa 1950). Since the record establishes that the defendant violated the licensing regulations of the FCC, and that he continued to make such unlicensed radio transmissions even after being notified that he was in violation of the statutes and regulations, continuing irreparable injury is present. Further, no adequate remedy at law exists in this regard. Therefore, injunctive relief shall be granted.

Accordingly, upon the credible and competent evidence before the court:

> 1. Plaintiff's request for declaratory relief is hereby GRANTED, and judgment shall be entered that:

(a). Defendant's low-power radio transmissions do not meet the technical specifications and administrative requirements of Part 15, Title 47 of the Code of Federal Regulations, and therefore a license is required pursuant to Section 301 of Title 47 of the United States Code; and

(b). Defendant does not possess a license or other authorization to make radio broadcasts, and therefore, defendant has violated Section 301 of the Communications Act, as amended.

2. Plaintiff's request for injunctive relief is hereby GRANTED. Defendant and all persons in active concert or participation with him are hereby ENJOINED from:

(a). making radio transmissions within the United States unless and until they first obtain a license from the FCC or other appropriate authorization in accordance with the Communications Act; and

(b). doing any act to cause unlicensed radio transmissions or to enable such radio transmissions to occur.

3. Defendant's motions for judgment on the pleadings or for summary judgment (Docket # s 18 & 19) are DENIED.

4. Plaintiff's motion for preliminary injunction (Docket # 2) is MOOT.

5. Defendant's motion for leave to file reply brief (Docket # 24) is DENIED.

6. Plaintiff's motion to supplement memorandum of law (Docket # 25) is GRANTED.

IT IS SO ORDERED, AND JUDGMENT SHALL BE ENTERED ACCORDINGLY.

Dated this 24th day of June, 1998.

Patrick A. Conmy, District Judge

United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3539

United States of America,	*	
	*	
Appellee,	*	
	*	
vs.	*	Order Denying Petition
	*	for Rehearing and for
Roy Neset,	*	Rehearing En Banc
	*	
Appellant.	*	
	*	

The petition for rehearing en banc is denied. Judge Richard S. Arnold, Judge Loken, Judge Morris Sheppard Arnold, and Judge Bye would grant the petition.

The petition for rehearing by the panel is also denied. (5128-010199)

March 15, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

98-2129 United States of America, Plaintiff-Appellant, v. Any And All Radio Station Transmission Equipment, Radio Frequency Power Amplifiers, Radio Frequency Test Equipment And Any Other Equipment Associated With Or Used In Connection With The Transmission At 97.7 MHZ, Located At 2903 Bent Oak Highway, Adrian, Michigan, Defendant-Appellee, Rick Strawcutter, Claimant-Appellee. 98-2396 United States of America, Plaintiff-Appellee, v. Any And All Radio Station Transmission Equipment, Radio Frequency Power Amplifiers, Radio Frequency Test Equipment And Any Other Equipment Associated With Or Used In Connection With The Radio Transmissions On Frequency 95.9 MHZ, Located At 3968 West Vernor Highway, Detroit, Michigan 48216, Defendant-Appellant, Maquina Musical, Incorporated, Claimant-Appellant, Juan V. Marinez, Catalina Martinez, Ignacio Campos, Jorge Canchola, Sergio Vallejo, Intervenors-Counterplaintiffs-Appellants.

Nos. 98-2129/98-2396

204 F.3d 658; 2000 U.S. App. LEXIS 2774; 2000 FED App. 0069P (6th Cir.); 19 Comm. Reg. (P & F) 819

December 10, 1999, Argued
February 25, 2000, Decided
February 25, 2000, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Michigan at Detroit. Nos. 97-73527; 98-74368. Julian A. Cook, Jr. and Patrick J. Duggan, District Judges.

DISPOSITION: REVERSED judgment of the district court in No. 98-2129 (Strawcutter), which dismissed the government's forfeiture case sua sponte pursuant to the

doctrine of primary jurisdiction, and REMANDED case for further proceedings. REMANDED No. 98-2396 (Maquina Musical) to the district court for reconsideration in light of its determination that the doctrine of primary jurisdiction precluded it from considering Maquina Musical's "constitutional defenses" to the government's forfeiture action. Concerning Maquina Musical's appeal from the district court's denial of its motion to dismiss the government's forfeiture complaint, DISMISSED appeal for lack of jurisdiction.

COUNSEL: ARGUED: Jacob M. Lewis, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for United States of America.

Patrick M. Edwards, CONSTITUTIONAL LITIGATION ASSOCIATION, Detroit, Michigan, for Claimants.

ON BRIEF: Jacob M. Lewis, Robert S. Greenspan, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for United States of America.

Kevin S. Ernst, Detroit, Michigan, Katharine M. Omansiek, Detroit, Michigan, for Appellants.

Patrick M. Edwards, CONSTITUTIONAL LITIGATION ASSOCIATION, Detroit, Michigan, for Claimants.

JUDGES: Before: JONES, COLE, and GILMAN, Circuit Judges.

OPINION BY: RONALD LEE GILMAN

OPINION:

RONALD LEE GILMAN, Circuit Judge. The principal question presented by these consolidated appeals is whether, under the doctrine of primary jurisdiction, district courts may decline to adjudicate in rem forfeiture actions brought by the United States against persons who operate radio stations without licenses. For the reasons set forth below, we conclude that the answer is no. We therefore REVERSE the judgment of the district court in No. 98-2129 (Strawcutter), which dismissed the government's forfeiture case sua sponte pursuant to the doctrine of primary jurisdiction, and REMAND the case for further proceedings. We also REMAND No. 98-2396 (Maquina Musical) to the district court for reconsideration in light of its determination that the doctrine of primary jurisdiction precluded it from considering Maquina Musical's "constitutional defenses" to the government's forfeiture action. Concerning Maquina Musical's appeal from the district court's denial of its motion to dismiss the government's forfeiture complaint, we DISMISS the appeal as premature.

I. BACKGROUND

A. No. 98-2129 (Strawcutter)

On November 12, 1996, the manager of a licensed FM radio station in Toledo, Ohio telephoned the Federal Communications Commission (FCC) and complained that the signal from a radio station identifying itself as "Radio Free Lenawee" was interfering with his station's signal.

During the preceding two weeks, a number of other persons had also complained to the FCC's Detroit office about Radio Free Lenawee's transmissions.

On November 14, 1996, the FCC sent a field agent to investigate the complaints. An unlicensed radio station identifying itself as Radio Free Lenawee was found to be broadcasting from a building at 2903 Bent Oak Highway, in Adrian, Michigan, at a frequency of 97.7 megahertz. The FCC later determined that Radio Free Lenawee was broadcasting at a strength of 29,625 microvolts per meter at a distance of over half a mile, far exceeding that permitted for unlicensed radio stations (a maximum of 250 microvolts per meter at a distance of three meters). *See* 47 C.F.R. § 15.239(b).

Rick Strawcutter, Radio Free Lenawee's owner and operator, took the position that he had a constitutional right to continue his radio broadcasts without interference from the government. FCC inspectors sought to inspect Radio Free Lenawee's premises. Strawcutter refused them permission to do so. The FCC notified Strawcutter by letter that he was violating the Communications Act of 1934, 47 U.S.C. §§ 151-614. Specifically, the letter stated that (1) the station's broadcast strength exceeded the maximum allowed by 47 C.F.R. § 15.239(b), (2) the station was violating 47 U.S.C. § 301 because it was operating an unlicensed transmitter, and (3) operating a transmitter without a license subjects the operator to the criminal penalties described in 47 U.S.C. § 501. Strawcutter responded with a letter in which he

explained that he had "come to a sincerely held conclusion that the [FCC] in reality has no Constitutional regulatory power over FM stations which run a power level less than 100 watts."

Between the end of November of 1996 and the end of February of 1997, the FCC conducted six field tests. Those tests established that Radio Free Lenawee, which was still unlicensed, was continuing to transmit, and was doing so in excess of the permissible signal strength.

On July 22, 1997, the government filed in the United States District Court for the Eastern District of Michigan a complaint in which it sought, pursuant to 47 U.S.C. § 510(a), the civil in rem forfeiture of the radio transmission equipment located at 2903 Bent Oak Highway, the source of Radio Free Lenawee's broadcasts. Strawcutter filed a claim of ownership on August 5, 1997, and an answer approximately two weeks later. In his answer, Strawcutter asserted that the FCC regulation that prohibits unlicensed "microbroadcasting" was invalid because it violated his rights under the First Amendment, the Equal Protection and Due Process Clauses of the Fifth Amendment, Article XIX of the United Nations Declaration of Human Rights, and Article XIX of the International Covenant on Civil and Political Rights. He also argued that the FCC regulation is inconsistent with its statutory mandate to "encourage the larger and more effective use of radio in the public interest," as set forth in 47 U.S.C. § 303(g).

Strawcutter's arguments centered around the FCC regulations found at 47 C.F.R. Part 73. Those regulations classify FM radio broadcast licenses as Class A, Class B,

Class C, or Class D, depending on the station's transmission power, antenna height, and the area or place from which the broadcasts emanate. *See* 47 C.F.R. §§ 73.210-.211. The FCC once granted Class D licenses to "microbroadcasters," but in 1978 adopted a regulation effectively preventing new Class D stations from operating, except in Alaska. *See* 47 C.F.R. § 73.512(c) (providing that no new Class D applications would be accepted, except in Alaska or by existing Class D stations seeking to change frequency).

We note that during the pendency of this appeal, the FCC has changed its position on microbroadcasting. *See In the Matter of Creation of a Low Power Radio Service,* FCC 99-6, 14 FCC Rcd 2471, at ¶ 1 (released Feb. 3, 1999) (proposing the creation of two new classes of low-power FM radio stations, and seeking comment "on whether to establish a third, 'microradio' class of low power radio service that would operate in the range of 1 to 10 watts."); *In the Matter of Creation of Low Power Radio Service,* 15 FCC Rcd 2205, 2000 FCC LEXIS 395, FCC 00-19, 2000 WL 85304, at ¶ 1 (released January 27, 2000) (authorizing, among other things, the licensing of low-power FM stations operating at a maximum of 10 watts). Notwithstanding this change in policy, however, Strawcutter apparently will still not be eligible for a broadcasting license. *See In the Matter of Creation of Low Power Radio Service,* 2000 WL 85304, at ¶¶ 51-55 (announcing that microbroadcasters who had broadcast without licenses in the past will now be eligible for low-power broadcast licenses, but only if they voluntarily ceased broadcasting

no later than February 26, 1999 "without specific direction to terminate by the FCC," or ceased broadcasting within 24 hours after being advised to do so by the FCC).

On June 9, 1998, the government moved for summary judgment, taking the position that it was entitled to summary judgment as a matter of law because there was no material issue of fact – indeed, the facts were essentially uncontroverted – as to whether Strawcutter had broadcast without a license despite being warned by the FCC that it was unlawful for him to do so. The only disputed issues were the validity of the regulations that Strawcutter concededly violated, and whether the authorizing statutes were unconstitutional or in conflict with a treaty. Those issues, the government argued, were part of a "regulatory challenge" that was "not justiciable" in the district court, because "Congress vested exclusive jurisdiction in the United States Courts of Appeals, whether that review involves FCC regulations generally or specific licensing decisions."

The government claimed that in challenging the legal basis of the statutes or regulations with which he disagreed, Strawcutter's sole options were to apply to the FCC for a broadcast license or to petition the FCC either to amend its regulations or to waive their application to him. Strawcutter argued that those administrative remedies offered him no realistic prospect of relief, because the FCC had an unyielding policy not to waive the regulations that bar microbroadcasters from transmitting. As many other microbroadcasters around the country have done, Strawcutter argued that the FCC was "being used as the tool of powerful broadcast corporations" that wished to maintain cartel-like control over the

airwaves, at the cost of suppressing potential competitors and depriving the listening public of "low-cost broadcasting on community issues as an alternative to mainstream perspectives."

The district court, in a memorandum and order dated August 7, 1998, denied the government's motion and, invoking sua sponte the doctrine of primary jurisdiction, dismissed the action for lack of subject matter jurisdiction. *See United States v. Any and All Radio Station Equipment (Strawcutter)*, 19 F. Supp. 2d 738 (E.D. Mich. 1998).

B. No. 98-2396 (Maquina Musical)

On April 16, 1998, the FCC's Detroit office received a complaint about an unlicensed FM radio station broadcasting at a frequency of 95.9 megahertz. That day, FCC agents went to 3968 West Vernor Highway in Detroit, and detected the emission of FM broadcast signals at 95.9 megahertz that were 146 times the maximum strength permitted by FCC regulations for unlicensed broadcasts. On April 21, 1998, the agents returned and detected FM broadcast signals that were nearly 8,900 times the maximum permitted for unlicensed broadcasts. The agents entered the premises of the station, which was called Radio Maquina, and spoke with Pedro Zamora, the president of Maquina Musical, which owns Radio Maquina. They told Zamora that Radio Maquina's broadcasts exceeded the maximum strength permitted by FCC regulations and that the broadcasts violated 47 U.S.C. § 301. It is undisputed that Maquina Musical did not have a broadcast license, and that it had never applied for one.

On May 4, 1998, the agents determined that Radio Maquina was continuing to broadcast. That day, the agents determined that the broadcast signals were more than 7,600 times the maximum permissible strength. The FCC's Detroit office sent Zamora a letter on May 12, 1998, again informing him that the broadcasts violated 47 U.S.C. § 301 and demanding that he cease broadcasting forthwith, or face numerous potential penalties, including criminal prosecution and civil forfeiture of his broadcasting equipment. Zamora replied to the FCC's letter by demanding an administrative hearing before any forfeiture proceedings against him were instituted. During August of 1998, the FCC determined that Radio Maquina was still broadcasting, and was continuing to do so well in excess of the maximum strength permitted by FCC regulations.

On October 7, 1998, the government filed a civil complaint in the United States District Court for the Eastern District of Michigan, seeking the forfeiture of Maquina Musical's broadcasting equipment. The next day, the government executed a writ of entry and a warrant of arrest, and proceeded to arrest (that is, seize) the equipment. On October 9, 1998, Maquina Musical – joined by several Radio Maquina listeners who were permitted to intervene in the action – filed a "verified complaint" in which it applied for a temporary restraining order and moved for a preliminary injunction, a dismissal of the government's forfeiture complaint for lack of subject matter jurisdiction, and an order quashing the in rem arrest warrant. After a hearing, the district court denied the application for a temporary restraining order. Subsequently, in a memorandum and order dated November 6,

1998, the district court denied the remainder of the relief sought by Maquina Musical. *See United States v. Any and All Radio Station Transmission Equipment (Maquina Musical)*, 29 F. Supp. 2d 393 (E.D. Mich. 1998).

In denying Maquina Musical's motion for a preliminary injunction, the district court assumed for the sake of argument that Maquina Musical could demonstrate that it would suffer irreparable harm without the injunction, *see Maquina Musical*, 29 F. Supp. 2d at 396 (citing *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), for the proposition that even brief deprivations of First Amendment freedoms constitute irreparable injury), and concluded that the risk of substantial harm to others was not great. The district court, however, found that Maquina Musical's likelihood of success on the merits was low and that the public interest did not favor allowing it to broadcast without a license during the pendency of the proceedings. Balancing these factors, the district court concluded that Maquina Musical was not entitled to a preliminary injunction.

II. ANALYSIS

A. No. 98-2129 (Strawcutter)

The doctrine of primary jurisdiction "arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency." *United States v. Haun*, 124 F.3d 745, 749 (6th Cir. 1997) (citing *Reiter v. Cooper*, 507 U.S. 258, 268, 122 L. Ed. 2d 604, 113 S. Ct. 1213 (1993)). When the doctrine applies, court proceedings are stayed so that the agency may bring its special competence to bear on the issue. *See*

id. Unfortunately, "no fixed formula exists for applying the doctrine[.]" *United States v. Western Pacific. R. Co.*, 352 U.S. 59, 64, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956)). Rather, "in every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Id.*

Those reasons, broadly speaking, are the desire for uniformity in adjudication and the belief that the decisionmaker with the most expertise and broadest perspective regarding a statutory or regulatory scheme will be most likely to resolve the issue correctly. *See id.* The doctrine has even been applied to the government itself. *See Far East Conference v. United States*, 342 U.S. 570, 96 L. Ed. 576, 72 S. Ct. 492 (1952) (ordering an antitrust action brought by the United States as a shipper dismissed pursuant to the doctrine of primary jurisdiction following the intervention of, and motion to dismiss by, the Maritime Board, the relevant federal agency).

But the doctrine does not apply when the specially competent agency is itself the plaintiff. *See*, e.g., *United States v. Alcon Laboratories*, 636 F.2d 876, 888 (1st Cir. 1981) ("Deference to an agency's primary jurisdiction makes little sense in the context of an enforcement proceeding initiated by the agency."); *ICC v. All-American, Inc.*, 505 F.2d 1360, 1362 (7th Cir. 1974) ("It has been suggested . . . that, in cases where the appropriate administrative body is before the court, the doctrine should not apply since a principal function of the rule, acquainting the court with the agency's position concerning the matter, has been satisfied."); *CAB v. Aeromatic Travel Corp.*, 489 F.2d 251, 254 (2d Cir. 1974) ("When the agency

chooses to go to the district court for enforcement, it makes little sense to refer the very question at issue to the agency."). Indeed, as the Second and Seventh Circuits have noted, a federal agency's decision to pursue a judicial remedy rather than an administrative one speaks volumes about its views regarding the necessity of administrative expertise. *See All-American, Inc.*, 505 F.2d at 1363; *ICC v. Maine Central R. Co.*, 505 F.2d 590, 594 (2d Cir. 1974) ("The very institution of suit in the courts by the relevant administrative body represents an exercise of its 'special competence.' ").

In essence, the district court held that a statute expressly authorizing the government to initiate a civil action in the district courts cannot be invoked by the government when it sues on behalf of the very agency charged by the statute with special competence over the regulatory issues in question. *See* 47 U.S.C. § 510 (providing that the illegal use of broadcasting equipment subjects the equipment to seizure and forfeiture if the equipment was used "with willful and knowing intent" to violate license requirement) and 28 U.S.C. § 1355 (vesting the district courts with original jurisdiction over "any action or proceeding" for forfeiture "incurred under any Act of Congress" other than those within the jurisdiction of the Court of International Trade). We cannot agree, and therefore reverse the district court's order dismissing this action for lack of subject-matter jurisdiction.

B. No. 98-2396 (Maquina Musical)

1. Preliminary injunction

Whether a preliminary injunction should be granted is a decision left to the district court's sound discretion. *See*, e.g., *Allied Systems, Ltd. v. Teamsters Nat'l Automobile Transporters Industry Negotiating Committee*, 179 F.3d 982, 985-86 (6th Cir.), cert. denied, 145 L. Ed. 2d 313, 120 S. Ct. 401 (1999). On appeal, our review focuses on whether the district court abused that discretion. This court has said that a district court, in deciding whether to grant an injunction, abuses its discretion when it "applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." E.g., *Schenck v. City of Hudson*, 114 F.3d 590, 593 (6th Cir. 1997).

Taken literally, the standard is difficult to understand. The idea of discretion connotes a reasoned, properly informed, deliberate choice between legally permissible alternatives. No judge deliberately chooses to apply an incorrect legal standard, misapply a correct legal standard, or rely upon clearly erroneous factual findings. Presumably, the standard as articulated in *Schenck* and numerous other cases is a shorthand way of expressing the idea that this court ordinarily extends a high degree of deference to the district court's decision, but does so only if the district court properly understood the pertinent law and applied it in a defensible manner to the facts as they appear in the record. Otherwise, affording deference to the district court makes little sense.

With this understanding in mind, reviewing the district court's order denying a preliminary injunction to

Radio Maquina in light of the pertinent factors – whether the movant is likely to succeed on the merits, whether the movant would suffer irreparable harm without the injunction, whether an injunction would cause substantial harm to others, and whether an injunction would be in the public interest – becomes relatively straightforward. *See*, e.g., *Connection Distribution Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), cert. denied, 526 U.S. 1087, 143 L. Ed. 2d 650, 119 S. Ct. 1496 (1999) (setting forth the pertinent factors for determining whether a preliminary injunction should be granted).

a. Irreparable harm

Maquina Musical's argument regarding irreparable harm is based on the premise that barring it from broadcasting would abridge both its First Amendment right to free speech and the First Amendment interests of its listeners to hear Radio Maquina's broadcasts. The district court assumed for the sake of argument that Zamora's "alleged deprivation of his First Amendment right to free speech by the government's seizure of his broadcasting equipment is sufficient to demonstrate irreparable injury." *See Maquina Musical*, 29 F. Supp. 2d at 396.

It need not have done so. As the Supreme Court has observed, "the right of free speech does not include . . . the right to use the facilities of radio without a license." *National Broadcasting Co. v. United States*, 319 U.S. 190, 227, 87 L. Ed. 1344, 63 S. Ct. 997 (1943). In *National Broadcasting Co.*, the Supreme Court broadly affirmed the Communications Act and its licensing standard of "public interest, convenience, or necessity" as

valid exercises of congressional power, and held that denying a license on that ground, "if valid under the Act, is not a denial of free speech." *Id. See* also *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64-65 (2d Cir. 1999) (per curiam) (rejecting the argument of unlicensed micro-broadcasters that the FCC's broadcast licensing scheme is subject to public forum analysis and strict judicial scrutiny).

In the present case, Maquina Musical never applied for a broadcast license. For that reason, neither it nor Zamora has any First Amendment interest in its broadcasts. We therefore conclude that Maquina Musical lacks any plausible claim to the presumption of irreparable harm. Maquina Musical also asserts that members of its listening audience – who intervened in this action and filed affidavits in support of its motion for injunctive relief – also have a First Amendment right "to hear the political, cultural and educational information conveyed to their community." But it follows that nobody has a First Amendment right to hear radio broadcasts from a station that does not have a First Amendment right to broadcast them. Cf. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980) (Stewart, J., concurring) (observing that the right to listen is implied by the right to speak).

In any event, we do not mean to suggest that this is the end of the analysis in determining whether Maquina Musical can possibly prevail in this case. Our point is just that the district court erred on the side of overgenerosity to Maquina Musical in assessing whether it had demonstrated a risk of irreparable harm. Cf. *Free Speech ex rel. Ruggiero*, 200 F.3d at 65 (concluding that the government

had established that it would suffer irreparable harm without an injunction "simply by establishing that plaintiffs were broadcasting without a license").

b. Likelihood of success on the merits

The district court found that Maquina Musical had not demonstrated that it was likely to prevail on the merits. In reaching this conclusion, the district court noted that it was undisputed that Maquina Musical had broadcasted without a license and, indeed, that it had never applied for a license, a waiver, or an amendment to the pertinent FCC regulations barring microbroadcasting. This, the district court concluded, was sufficient for the government to establish probable cause that Maquina Musical had violated 47 U.S.C. § 301 (which prohibits radio broadcasting without a license) and, by extension, that its broadcasting equipment was subject to forfeiture under 47 U.S.C. § 510(a), which subjects to forfeiture "any electronic, electromagnetic, radio frequency, or similar device, or component thereof . . . used . . . with willful and knowing intent to violate [47 U.S.C. §] 301 [or FCC regulations promulgated under § 301]."

Because Maquina Musical produced absolutely no evidence to rebut its violation of a facially valid federal statute, we believe that the district court was correct in its ultimate conclusion that the station had failed to demonstrate that it was likely to succeed on the merits. *See United States v. Certain Real Property 566 Hendrickson Blvd., Clawson, Oakland County, Mich.*, 986 F.2d 990, 995 (6th Cir. 1993) (noting that in forfeiture cases, the government is

entitled to a judgment of forfeiture upon an unrebutted showing of probable cause).

Maquina Musical also contends that the FCC regulation announcing the moratorium on Class D licenses, 47 C.F.R. § 73.512(c), was an unconstitutional prior restraint on speech. In response, the government argues that even if the regulation was ultimately held to be unconstitutional, it would not matter, because the government's forfeiture case begins and ends with Maquina Musical's violation of 47 U.S.C. § 301. The district court concluded, however, that it lacked jurisdiction to entertain Maquina Musical's constitutional defenses because 28 U.S.C. § 2342 provides that the courts of appeals have exclusive jurisdiction "to enjoin, set aside, suspend . . . or to determine the validity of . . . all final orders of the [FCC]. . . . "

We disagree, "for the simple reason that no FCC order is being challenged." *United States v. Any and All Radio Station Transmission Equipment (Laurel Avenue)*, 169 F.3d 548, 554 (8th Cir.) (M. Arnold, J., concurring in the result), reh'g granted, 182 F.3d 1026 (8th Cir. 1999). Indeed, as Judge Morris Arnold said in his short but well-reasoned opinion in *Laurel Avenue*: "Until today I had not supposed that anyone could plausibly maintain that any court of the United States, properly seized of jurisdiction of a suit, did not also have jurisdiction to consider constitutional defenses to that suit." *See Laurel Avenue*, 169 F.3d at 554 (M. Arnold, J., concurring in the result). *Laurel Avenue* involved facts that are virtually identical to those of the present case, in that the government sought the in rem forfeiture of an unlicensed microbroadcaster's radio transmission equipment.

Congress presumably could have created a streamlined forfeiture remedy that excluded certain defenses by giving claimants the opportunity to raise those defenses in some other forum. But it did not do so. Forfeiture actions, although nominally civil, are quasi-criminal in nature. *See One 1958 Plymouth Sedan v. Com. of Pa.*, 380 U.S. 693, 700, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965). As a consequence, some of the protections to which criminal defendants are entitled also apply in forfeiture cases. *See, e.g., United States v. $ 53,082.00 in United States Currency*, 985 F.2d 245, 250 (6th Cir. 1993) (applying the Fourth Amendment exclusionary rule in a forfeiture case). We believe that this makes it even less likely that Congress enacted a statute that allows the government to forfeit a person's property while denying the owner the right to defend himself by challenging the legal basis of the government's forfeiture case.

Although we conclude that the district court erred in holding that it lacked jurisdiction to adjudicate Maquina Musical's arguments, this does not mean that Maquina Musical is any closer to demonstrating that it is likely to succeed on the merits. With one exception, the cases Maquina Musical relies upon for the boilerplate propositions that restrictions on First Amendment rights must be "narrowly tailored" and that "prior restraints" on protected free speech are presumptively invalid have nothing to do with radio broadcasting, much less with unlicensed radio broadcasting. The one exception is *FCC v. League of Women Voters of California*, 468 U.S. 364, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984), which concerned the constitutionality of a statute prohibiting licensed broadcasters that accepted federal funding from engaging in

"editorializing." Even in that opinion, the Court repeatedly observed that broadcasting may legitimately be regulated in ways that would be unconstitutional in other contexts. *See id.* at 374 ("Because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media").

c. Substantial harm to others

The district court concluded that it did "not believe that the absence of Hispanic radio programming outweighs what would amount to judicial sanction of an unlicensed radio station." This appears to be more a weighing of the "substantial harm" factor against the "public interest" factor than strictly a consideration of whether the inability of Maquina Musical's audience to hear the station's broadcasts constitutes substantial harm. We agree, however, with the district court's conclusion. As previously stated in Part II.B.1.a. above, nobody has a First Amendment right to hear radio broadcasts from a station that does not have a First Amendment right to broadcast them.

d. Public interest

Finally, the district court concluded that the public interest did not favor granting the injunction because the government has an interest in the uniform and consistent application of the Communications Act. Maquina Musical argues that "the district court erred as a matter [sic] law and fact" because the "policy of free speech is the very cornerstone of a democratic society." This is undoubtedly

true, but we think that Maquina Musical avoids the issue by defining the question considerably more abstractly than the Supreme Court has been willing to do. As noted above, the Court has made it quite clear that unlicensed broadcasting is not considered free speech protected by the First Amendment. *See* Part II.B.1.a. above.

We express no opinion on whether the constitutionality of the challenged FCC regulation is an appropriate consideration in deciding the merits of this case. The district court may have been right when it concluded that even if the challenged regulation is unconstitutional, the statute is valid, and that Maquina Musical's violation of the statute is the beginning and end of the government's forfeiture case. But before this court decides the issue, it should be resolved on the merits by the district court. We will therefore remand this case to the district court so that it can determine whether it wishes to adhere to its reasoning in light of its ability to consider the constitutionality of the FCC regulations.

2. Motion to dismiss

Maquina Musical is also appealing from the portion of the district court's order that denied the station's motion to dismiss the government's complaint. An order denying a motion to dismiss is not a "final decision" appealable under 28 U.S.C. § 1291 in the absence of special factors, none of which are present here. Cf. *Lickiss v. Drexler*, 141 F.3d 1220, 1222 (7th Cir.) (noting that a denial of a motion to dismiss based on qualified immunity is considered a final, appealable order if there are no material facts in dispute, because part of the harm sought

to be averted by the doctrine of immunity is the necessity of standing trial), cert. denied, 525 U.S. 1002, 119 S. Ct. 513, 142 L. Ed. 2d 425 (1998). The denial is also not an immediately appealable interlocutory order within the meaning of 28 U.S.C. § 1292(a)(1). Finally, the doctrine of pendent appellate jurisdiction does not apply, because the issue of whether Maquina Musical's motion for a preliminary injunction should have been granted is not "coterminous with, or subsumed in" the issue of whether its motion to dismiss the government's complaint should have been granted. *See Brennan v. Twp. of Northville*, 78 F.3d 1152, 1158 (6th Cir. 1996). We therefore find no basis to consider Maquina Musical's motion to dismiss as part of the present appeal.

III. CONCLUSION

For all of the reasons set forth above, we REVERSE the judgment of the district court in No. 98-2129 (Strawcutter), which dismissed the government's forfeiture case sua sponte pursuant to the doctrine of primary jurisdiction, and REMAND the case for further proceedings. We REMAND No. 98-2396 (Maquina Musical) to the district court for reconsideration in light of its determination that the doctrine of primary jurisdiction precluded it from considering Maquina Musical's "constitutional defenses" to the government's forfeiture action. Concerning Maquina Musical's appeal from the district court's denial of its motion to dismiss the government's forfeiture complaint, we DISMISS the appeal for lack of jurisdiction.

Supreme Court, U.S.
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No. 00-1872

In the Supreme Court of the United States

ROY NESET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a person engaged in unlicensed, low power radio broadcasts can raise, as a defense to an action for an injunction brought by the government in district court, the alleged invalidity of the Federal Communications Commission's regulations concerning low power radio stations.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 235 F.3d 415. The opinion of the district court (Pet. App. A16-A26) is reported at 10 F. Supp. 2d 1113.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2000. A petition for rehearing was denied on March 15, 2001 (Pet. App. A27). The petition for a writ of certiorari was filed on June 13, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 (Communications Act or Act) seeks "to maintain the control of the United States over all the channels of radio transmission." 47 U.S.C. 301. The Act therefore provides that "[n]o person shall use or operate any apparatus for the transmission of * * * signals by radio" without "a license in that behalf granted under the provisions of this [Act]." *Ibid.* The Act authorizes the Federal Communications Commission (FCC or Commission) to grant radio licenses when it finds that the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. 307(a). The Act also authorizes the Commission to issue rules and regulations regarding license applications and orders regarding specific license applications. 47 U.S.C. 154(i).

Section 402(a) of Title 47 of the United States Code specifies that any challenge to the validity of an FCC rule or regulation must be brought under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2342 (1994 & Supp. V 1999), which in turn provides that the courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. 2342 (1994 & Supp. V 1999). See also *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 425 (1942) (FCC's promulgation of regulations is an order reviewable under Section 402(a)). Section 402(b) of Title 47 further provides that the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review FCC orders regarding individual license applications,

modifications, revocations, or suspensions. 47 U.S.C. 402(b) (1994 & Supp. V 1999).

The Communications Act provides a number of mechanisms to enforce its licensing requirement, including cease-and-desist orders (47 U.S.C. 312 (1994 & Supp. V 1999)), monetary and in rem forfeitures (47 U.S.C. 503, 510), and criminal penalties (47 U.S.C. 501). The Act also authorizes the government to seek injunctive relief by granting jurisdiction to the district courts, "upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter." 47 U.S.C. 401(a) (1994).

2. In 1997, the FCC received a complaint from an AM radio station in Tioga, North Dakota, that petitioner was engaged in unlicensed broadcasting in the Tioga area at a frequency of 88.1 MHz. Pet. App. A3. The FCC sent petitioner a warning letter, which informed him that 47 U.S.C. 301 prohibits broadcasting without a license. *Ibid.* Petitioner refused to stop broadcasting. *Ibid.*

After FCC officials determined that petitioner's signal exceeded the blanket license permitted under Part 15 of the FCC's regulations, Pet. App. A3-A4, the United States filed suit in federal district court to enjoin petitioner from broadcasting without a license in violation of 47 U.S.C. 301. Pet. App. A4. In his answer, petitioner admitted that he had engaged in radio broadcasting and that he had not applied to the FCC for a license or for a waiver of the Communications Act's licensing requirements. *Ibid.* Nevertheless, he opposed the government's request for an injunction on

the ground that the FCC's regulations, which at that time prohibited the licensing of low power radio stations such as petitioner's, violated his rights under the First Amendment and other constitutional and statutory provisions. *Id.* at A18.[1]

The district court granted the government's request for an injunction. Pet. App. A16-A26. The court found that "it cannot be disputed that [petitioner] has violated the licensing requirement of 47 U.S.C. § 301." *Id.* at A18. The court concluded that petitioner "has made low-power radio transmissions in excess of the exemption limits provided by 47 C.F.R. § 15.239(b) so that [petitioner] is required to have a license in making such transmissions, and * * * [petitioner] has violated [the licensing requirement of] 47 U.S.C. § 301." Pet. App. A18. In addition, the court ruled that it did not have subject matter jurisdiction over petitioner's statutory defenses in light of 47 U.S.C. 402 and 28 U.S.C. 2342 (1994 & Supp. V 1999), which vests in the courts of appeals exclusive jurisdiction to review "all policies,

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[1] Petitioner used a one-watt transmitter with a 30-watt amplifier to broadcast a signal that could be heard at a range of about 5 miles from his property. Pet. App. A3. In 1997, when this dispute arose, the Commission generally would not license low power radio stations, *i.e.*, stations operating at under 100 watts. Until 1978, the Commission had licensed low power (typically 10-watt) educational stations. In 1978, however, the Commission explained that it would no longer license such stations because they "function in a manner which defeats the opportunity for other more efficient operations which could serve larger areas, and bring effective noncommercial educational radio service to many who now lack it." *In re Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C.2d 240, 248 (1978), aff'd on recons., 70 F.C.C.2d 972, 973 (1979). The Commission has since abandoned its policy against licensing low power radio stations and established a system for licensing them. See p. 6, *infra*.

practices and regulations adopted by the FCC." Pet. App. A19. Finally, relying on *United States* v. *Dunifer*, 997 F. Supp. 1235 (N.D. Cal. 1998), aff'd, 219 F.3d 1004 (9th Cir. 2000), the court held that petitioner did not have standing to raise an as-applied constitutional challenge to the FCC's low power rules because he had never applied for a broadcast license, and any claim that the rules were unconstitutionally overbroad failed because the regulatory scheme set forth procedures for the agency to follow and provided for judicial review of any ruling. Pet. App. A20-A23.

3. The United States Court of Appeals for the Eighth Circuit affirmed. Pet. App. A1-A15. Relying on its prior decision in *United States* v. *Any and All Radio Station Transmission Equipment* (*Fried*), 207 F.3d 458 (2000), cert. denied, 121 S. Ct. 761 (2001), the appeals court held that "the district court lacked subject matter jurisdiction over [petitioner's] affirmative defenses attacking the validity of the microbroadcasting regulations." Pet. App. A13. The court of appeals reiterated, as it had in *Fried*, that "the exclusive jurisdiction of the Court of Appeals over rulemaking * * * may not be evaded by seeking to enjoin a final order of the FCC in the district court." *Ibid.* (quoting *Fried*, 207 F.3d at 463) (citing *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984)). The court also stated that "[petitioner's] defensive attack on the validity of the microbroadcasting regulations would be just as much 'an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction.'" *Ibid.* (quoting *Fried*, 207 F.3d at 463).

The court of appeals also ruled that "the district court did not abuse its discretion in permanently enjoining [petitioner] from broadcasting without a license" because "[t]he record established that [peti-

tioner] was broadcasting without a license or a waiver in violation of the Communications Act, as amended." Pet. App. A14. It therefore affirmed the district court's judgment. *Ibid.*[2]

The court of appeals, with four judges dissenting, denied petitioner's request for en banc review. Pet. App. A27.

4. After the events at issue in this case, the Commission determined that low power stations that meet certain conditions will not interfere with existing full power FM stations. It therefore issued new rules establishing two classes of low power noncommercial radio stations, one at a maximum of 100 watts and one at a maximum of 10 watts. *In re Creation of Low Power Radio Service*, 15 F.C.C.R. 2205 (rel. Jan. 27, 2000), aff'd on recons., FCC 00-349 (rel. Sept. 28, 2000). A petition to review the FCC's low power rules is pending before the United States Court of Appeals for the District of Columbia Circuit. *National Ass'n of Broad.* v. *FCC*, No. 00-1054 (argued Nov. 28, 2000).

Subsequently, Congress passed the Act of December 21, 2000, Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762A-111 (2000) (Broadcasting Preservation Act). In that Act, Congress ordered the FCC to modify its low power rules in certain ways, including to "prohibit any applicant from obtaining a low-power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of [47 U.S.C.] section 301." § 632(a)(1)(B), 114 Stat. 2762A-111. On

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[2] Judge Heaney dissented. In his view, "district courts in this type of case have jurisdiction to hear First Amendment challenges to the Federal Communications Commission's prohibition of microbroadcasting in the context of an enforcement action filed against them." Pet. App. A15.

April 2, 2001, the Commission issued rules implementing the Broadcasting Preservation Act, including the disqualification of unlicensed broadcasters. See *Creation of a Low Power Radio Service*, Second Report and Order, FCC 01-1000, ¶¶ 10-11.[3]

ARGUMENT

On January 8, 2001, this Court denied certiorari in *United States* v. *Any and All Radio Station Transmission Equipment (Fried)*, 207 F.3d 458 (8th Cir. 2000), the decision upon which the court of appeals relied in this case. See 121 S. Ct. 761 (2001). The decision in this case presents issues essentially the same as those that were presented in *Fried*, and there have been no subsequent developments that would strengthen the basis for certiorari. Accordingly, the Court should deny the petition in this case.

1. a. The court of appeals correctly affirmed the district court's conclusion that it lacked jurisdiction to entertain petitioner's First Amendment challenge to the FCC's licensing regulations.[4] As the court of

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[3] By order dated January 8, 2001, the District of Columbia Circuit ordered the parties in the *National Association of Broadcasters* case to file supplemental briefs addressing the constitutionality of the Broadcasting Preservation Act's disqualification of unlicensed broadcasters. The court has set the matter for argument on September 6, 2001.

[4] As we have noted above, in the district court, petitioner challenged the regulations on a variety of constitutional and statutory grounds. See p. 4, *supra*. His petition for a writ of certiorari, however, concerns only his First Amendment challenge. See Pet. i (referring to "a constitutional defense"; *id.* at 10 (describing "the issue presented" as "whether the federal district courts have jurisdiction to consider the constitutionality of FCC regulations"); *id.* at 22-23 (relying on the importance of the First Amendment issues at stake to support the request for review).

appeals held, the Communications Act confines review of FCC regulations to the courts of appeals. See Pet. App. A12-A13.

The Communications Act expressly provides that "*[a]ny* proceeding to enjoin, set aside, annul, or suspend *any order* of the Commission under this chapter (except those appealable under subsection (b) of this section[5]) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28." 47 U.S.C. 402(a) (emphasis added). That chapter in turn provides, in relevant part, that "[t]he court of appeals (other than the United States Court of Appeals for the Federal Circuit) has *exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or *to determine the validity of*—(1) *all final orders* of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. 2342(1) (emphasis added). This Court long ago held that "the Commission's promulgation of [its] regulations is an order reviewable under [47 U.S.C.] 402(a)." *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 425 (1942). As the Eighth Circuit earlier concluded, "[i]t is hard to think of clearer language confining the review of regulations to the Courts of Appeal[s]." *Fried*, 207 F.3d at 463.

Moreover, as the court of appeals noted (Pet. App. A13), this Court has held that the exclusive jurisdiction of the courts of appeals over FCC rulemaking may not be evaded by seeking to enjoin a final order of the FCC in the district court. See *FCC* v. *ITT World*

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[5] Subsection (b) of 47 U.S.C. 402 gives the United States Court of Appeals for the District of Columbia Circuit jurisdiction over FCC orders regarding individual license applications, modifications, revocations, or suspensions. 47 U.S.C. 402(b) (1994 & Supp. V 1999).

Communications, Inc., 466 U.S. 463, 468 (1984). See also *Fried*, 207 F.3d at 463. "A defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." Pet. App. A13 (quoting *Fried*, 207 F.3d at 463). Therefore, in this case, just as in *ITT*, the only "appropriate procedure for obtaining judicial review of the agency's [regulatory actions] was appeal to the Court of Appeals as provided by statute." 466 U.S. at 468.

As the court of appeals recognized in *Fried*, the statutory scheme's requirement of an initial regulatory decision by the Commission followed by review in the court of appeals makes eminent sense. 207 F.3d at 463. It "ensure[s] review based on an administrative record made before the agency charged with implementation of the statute." *Ibid.* In addition, it "ensure[s] uniformity of decisionmaking because of uniform fact-finding made by the agency." *Ibid.* Finally, it "bring[s] to bear the agency's expertise in engineering and other technical questions." *Ibid.*

b. Petitioner mistakenly claims (Pet. 17-18) that Section 402(a) is not applicable to his challenge because the FCC has not issued an "order" from which he could appeal. Contrary to petitioner's contention that "the F.C.C. regulatory scheme disallowing micro-broadcasting does not constitute an appealable 'order' under § 402(a)" (Pet. 17), the promulgation of regulations is (as we have explained above) an "order" within the meaning of Section 402(a). See *Columbia Broad. Sys.*, 316 U.S. at 425. Petitioner's lack of standing to challenge those regulations directly (see Pet. 17) does not negate the existence of an "order" triggering the applicability of Section 402(a).

To the extent that petitioner's argument is based on the absence of any order that he personally can appeal at this time, petitioner himself is responsible for that situation. He could have petitioned the FCC for a rulemaking to repeal or modify its low power broadcasting regulations. See 47 C.F.R. 1.401(a) (providing that "[a]ny interested person may petition for the issuance, amendment or repeal of a rule or regulation" of the Commission). If the Commission denied the request, or granted it in a manner that aggrieved petitioner, he could have appealed that order to the court of appeals in accordance with Section 402(a).

In the alternative, petitioner could have raised his challenge to the FCC's low power broadcasting policies by filing an application for a broadcast license, accompanied by a request for a waiver of the FCC's low power regulations. If the Commission denied his application and request for waiver, petitioner could then have appealed the denial to the United States Court of Appeals for the District of Columbia Circuit, where he could have asserted that the regulations were constitutionally invalid. See 47 U.S.C. 402(b)(1) (1994 & Supp. V 1999); note 5, *supra*. See generally *Turro* v. *FCC*, 859 F.2d 1498, 1499 (D.C. Cir. 1988). The fact that petitioner sought to bypass the Communication Act's judicial review procedures cannot vest the district courts with jurisdiction to review FCC rules in contravention of the Act's command that review of those rules is the exclusive province of the courts of appeals. See *United States* v. *Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000).

There is also no merit to petitioner's claim (Pet. 21) that the Commission could use the waiver process to insulate "blatantly unconstitutional regulations" from review. The FCC's failure to act on a license application or waiver in a timely manner is subject to review

by mandamus in the court of appeals. See *Telecommunications Research and Action Ctr.* v. *FCC*, 750 F.2d 70 (D.C. Cir. 1984). Furthermore, as we have explained, someone who wants to make a constitutional challenge to an existing regulation can do so by filing a petition requesting the FCC to repeal the objectionable regulation, see 47 C.F.R. 1.401(a), and may obtain judicial review of the Commission's action on that petition in the court of appeals, 47 U.S.C. 402(a).

c. Petitioner also errs in contending (Pet. 16-17) that the decision in this case is inconsistent with 47 U.S.C. 401(a), which vests jurisdiction in the district courts to grant the government's request for an injunction against a violation of the Communications Act. Contrary to petitioner's contention that Section 401(a) permits him to "assert all available defenses" in the district court (Pet. 17), that provision does not address the defenses that can be raised, much less suggest that the district court is empowered to address the validity of FCC rules. In any event, the invalidity of the FCC's low power broadcasting regulations would not undermine the basis for the government's injunction, which is that petitioner chose to broadcast without obtaining a license as required by the Act. See *United States* v. *Any and All Radio Station Transmission Equipment (Perez)*, 218 F.3d 543, 549-550 (6th Cir. 2000) (holding that First Amendment does not provide a defense to the forfeiture of radio equipment used in unlicensed low power broadcasting).

Petitioner's assertion (Pet. 18) that the decision of the court of appeals "departs from established federal jurisdiction and standing principles when a party faces an enforcement action brought by the government" is unfounded. Petitioner's sole support for that proposition (see Pet. 19) is a single sentence from a treatise on

federal courts that does not address the question at issue here—whether a defendant in an enforcement action can raise an issue in that action when resolution of that issue is committed by statute to another forum and the defendant has bypassed available opportunities to raise the issue in the forum to which it is statutorily committed.

2. Petitioner asserts (Pet. 10-15) that there is a conflict between the decision in this case and the Sixth Circuit's decision in *United States* v. *Any and All Radio Transmission Equipment (Strawcutter)*, 204 F.3d 658 (2000). There, the Sixth Circuit concluded that a district court may, in ruling on a forfeiture action against radio equipment used for unlicensed broadcasting, consider whether the low power regulations are unconstitutional. *Id.* at 667. Although there is tension between the two cases,[6] as in *Fried*, this Court's review is not warranted at this time.

a. First, this case is not an appropriate one in which to resolve the disagreement among the courts of appeals, because resolution of that disagreement will not affect the ultimate outcome of this litigation. The asserted invalidity under the First Amendment of the FCC's low power broadcast regulations is not a defense to an action to enforce the Communications Act's licensing requirements.

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[6] There is not a square conflict between this case and *Strawcutter* because this case involves the government's suit for an injunction and *Strawcutter* involved a suit for forfeiture of radio equipment. In both cases, however, the government was invoking statutorily-authorized remedies intended to foreclose unlicensed broadcasting in violation of 47 U.S.C. 301. And *Fried*, the decision on which the court of appeals relied in this case, was (like *Strawcutter*) an appeal from an *in rem* forfeiture. See Pet. App. A13.

It has long been settled that the Act's prohibition on broadcasting without a license does not violate the First Amendment. *National Broad. Co.* v. *United States* (*NBC*), 319 U.S. 190, 227 (1943) ("The right of free speech does not include * * * the right to use the facilities of radio without a license."); see also *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 638 (1994); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 388-389 (1969). Indeed, petitioner conceded in the district court (Pet. App. A20) that the Communications Act's licensing requirement is valid. Thus, even if petitioner is correct that he would qualify for a license but for an unconstitutional impediment to his receiving one, he still has no entitlement to broadcast without one. If the rule were otherwise, the "confusion and chaos" that was characteristic of the airwaves before effective government regulation—in which, with "everybody on the air, nobody could be heard," *NBC*, 319 U.S. at 212—would necessarily reappear because of the inevitable interference.

Strawcutter itself and a subsequent Sixth Circuit decision support that conclusion. The court noted in *Strawcutter* that "[t]he district court may have been right when it concluded that even if the challenged regulation is unconstitutional, the statute is valid, and that [the broadcaster's] violation of the statute is the beginning and end of the government's forfeiture case." 204 F.3d at 668. And, in *United States* v. *Any and All Radio Station Transmission Equipment (Perez)*, 218 F.3d 543, 549-550 (2000), the Sixth Circuit affirmed a district court's ruling that the First Amendment did not provide a defense to forfeiture of radio equipment used in unlicensed low power broadcasting. The court stated: "Because [the claimant] does not have a First Amendment right to broadcast his views on an un-

licensed radio station, this argument does not present a defense to forfeiture." *Id.* at 549-550.

In sum, as a practical matter, it makes no difference which court has jurisdiction over petitioner's challenge to the FCC's regulations, because that challenge cannot immunize petitioner from the consequences of his violation of the Act's licensing requirement.[7]

b. This Court's resolution of the disagreement among the courts of appeals is also not necessary at this time because there is reason to believe that the Sixth Circuit may reconsider its current position. In *Strawcutter*, the Sixth Circuit adopted Judge Morris Arnold's concurrence in the original panel opinion in *Fried*. See 204 F.3d at 667. One month after the *Strawcutter* decision was issued, however, Judge Arnold and Judge McMillian voted to vacate the prior opinions (including Judge Arnold's concurrence) and to affirm the district court in accordance with the views of Judge Noonan. Pet. App. A9-A10; see 207 F.3d at 462-463. It is possible, given the Eighth Circuit's reversal of position, that the Sixth Circuit will likewise reconsider its view when presented with an appropriate opportunity.

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[7] Indeed, it is precisely because the outcome on the merits of this sort of case is so clear that the Second Circuit recently avoided resolving the jurisdictional issue. *Prayze FM* v. *FCC*, 214 F.3d 245, 251 (2000). See Pet. 11 n.2. In *Prayze*, the Second Circuit affirmed the grant of a preliminary injunction against an unlicensed low power broadcaster. The court declined to "resolve the jurisdictional question" because, "even assuming" that the district court would have jurisdiction to evaluate the constitutionality of the low power regulations, the FCC had demonstrated that it would likely prevail. See 214 F.3d at 251. Because the unlicensed broadcaster's attack on the low power rules lacked merit, the Second Circuit saw no need to resolve the disagreement identified by petitioner. *Ibid.*

For that reason, two courts of appeals have questioned the continuing vitality of the *Strawcutter* opinion. The Second Circuit, for example, noted the decision in *Strawcutter* but observed that "in reaching that result the Sixth Circuit relied in relevant part on an Eighth Circuit opinion that was superseded." *Prayze*, 214 F.3d at 251. Similarly, the Ninth Circuit, after explaining that it found the reasoning of the court of appeals in *Fried* "persuasive," cited *Prayze*, "pointing out the Sixth Circuit's reliance on now out-of-date Eighth Circuit case law." *United States* v. *Dunifer*, 219 F.3d 1004, 1007 & n.7 (9th Cir. 2000).[8]

Further doubt as to the vitality of the Sixth Circuit's position has also been created by *La Voz Radio de La Communidad* v. *FCC*, 223 F.3d 313, 318 (2000), in which the Sixth Circuit held that a district court lacked jurisdiction to consider the validity of the FCC low power rules in the context of a lawsuit for injunctive relief initiated by the broadcaster. The *La Voz* court distinguished *Strawcutter* on the ground that in *Strawcutter* there was no final order, the rationale offered by Judge Arnold's concurring opinion. 223 F.3d at 320.

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[8] Petitioner also contends (Pet. 16 n.5) that the Ninth Circuit case law relating to the issue presented by this case is "unsettled." Petitioner relies for that contention on *Dunifer* and on *Dougan* v. *FCC*, 21 F.3d 1488, 1491 (9th Cir. 1994), in which the court of appeals denied a petition to review an FCC monetary forfeiture order on the ground that the district court is the proper court to consider the validity of forfeiture orders. The Ninth Circuit in *Dunifer* reiterated, however, that *Dougan* remains good law "at least with respect to monetary forfeitures," 219 F.3d at 1007 n.6. Thus, that circuit's case law is not unsettled. In any event, any disagreement within the Ninth Circuit would not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

The Eighth Circuit's subsequent decision to abandon that rationale calls into question the distinction relied upon by the Sixth Circuit in *La Voz*.

Finally, the Sixth Circuit recently declined to extend *Strawcutter* to the situation in which the FCC seeks an injunction to enforce a previously issued cease and desist order. See *United States* v. *Szoka*, No. 99-02008, 2001 Fed. App. 0245P (July 30, 2001), *available at* http://pacer.ca6.uscourts.gov/cgibin/getopn.pl?OPINION=01a0245p.06 (visited July 30, 2001), at 7-10. Although the court of appeals noted that its "holding is not meant to cast any doubt on the court's prior holding in *Strawcutter*," the court expressly "reserve[d] for another day" the question presented in this case and "in *Fried*"—"whether a broadcaster can raise constitutional arguments to the district court in defense against the government's motion for an injunction when an FCC cease and desist order has not previously been issued." *Id.* at 13 n.13. Thus, the Sixth Circuit has left open the possibility that it will reconsider its reasoning in *Strawcutter*, at least in the factual context presented here. Moreover, the fact that *Strawcutter* has not been applied by the Sixth Circuit to actually invalidate a forfeiture on the merits further diminishes that decision's precedential force.

c. Two final considerations counsel against review by this Court at this time. The first is the FCC's adoption of rules authorizing low power broadcasting. See p. 6, *supra*. That action may significantly reduce the number of FCC enforcement actions. As petitioner emphasizes (Pet. 7-8), in the past many individuals may have felt frustrated with the agency's flat prohibition on low power broadcasting. Now, however, the FCC has established a regulatory regime, in accordance with the Broadcasting Preservation Act, that permits low

power licensing in appropriate circumstances and has begun to issue construction permits for low power stations under its new rules. FCC Broadcast Actions, Report No. 44965 (actions of Apr. 12, 2001) (granting 25 low power permits) (*available at* http://www.fcc.gov/Bureaus/Mass_Media/Public_Notices/ Brdcst_Actions/ac010417.txt) (visited July 30, 2001). The FCC's new low power rules may therefore substantially reduce the future significance of this case, which arose under the prior regulatory regime.

Second, petitioner's ineligibility for a low power FM license is now a result of statute. Under the Broadcasting Preservation Act, the Commission is required to preclude any applicant from obtaining a low power FM license if that applicant has "engaged in any manner in the unlicensed operation of any station in violation of [47 U.S.C.] section 301." Pub. L. No. 106-553, § 632(a)(1)(B), 114 Stat. 2762A-111. See *Creation of a Low Power Radio Service*, Second Report and Order, FCC 01-1000, ¶¶ 10-11 (Apr. 2, 2001). It is established here that petitioner has engaged in unlicensed broadcasting in violation of 47 U.S.C. 301. Pet. App. A14. To the extent that petitioner disagrees with the congressional choice to render him ineligible for a low power license, he may challenge the statutory bar in federal district court without regard to the exclusive jurisdiction provisions of 47 U.S.C. 402 (1994 & Supp. V 1999). See *Time Warner Entm't Co., L.P.* v. *FCC*, 93 F.3d 957, 965 (D.C. Cir. 1996). Because petitioner's ineligibility now rests upon a statute that petitioner may challenge in district court, the court of appeals' jurisdictional ruling has little future significance so far as petitioner's individual circumstances are concerned.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

ROY NESET,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The United States dedicates a large portion of its opposition brief to the petition for writ of *certiorari* to arguing the merits of the case. *See* Opp. 1.a, 1.b, 1.c. However, it offers no persuasive reasons why the petition should not be granted.

The United States' argument against granting the petition rests primarily on the fact that this Court denied *certiorari* in the factually similar *United States v. Any and All Radio Station Transmission Equipment* (*Fried*), 207 F.3d 458 (8th Cir. 2000). This reliance is misguided, for it overlooks key differences between *Fried* and the instant case and fails to take into account developments that have occurred subsequent to the denial of *certiorari* in *Fried* which underline and exacerbate the split in federal authority in this area of the law.

1. While *Fried* and the instant case both involve a question of whether federal district courts have jurisdiction to consider the constitutionality of Federal Communications Commission (FCC) regulations as a defense to an FCC action, there is an important difference. In *Fried*, the FCC sought the in rem forfeiture of Mr. Fried's radio equipment. 207 F.3d at 459. In the instant case, the FCC went much further by seeking an injunction against petitioner to stop him from broadcasting entirely. Pet. App. A4. The onerous and restrictive nature of an injunction, which restricts an individual's freedom of speech, raises the importance of resolving this question of law to a new level and provides a sense of urgency that simply did not exist when this Court denied *certiorari* in *Fried*.

2. Moreover, the federal judicial landscape has become even more unsettled over whether constitutional defenses may be raised in FCC actions in federal district courts since this Court considered the *Fried* petition for *certiorari*. Additional decisions in the Sixth Circuit and the federal district of Connecticut have sharpened the split of authority and added to the confusion and uncertainty on this important issue of federal jurisdiction. In

the recent *United States v. Szoka*, 2001 U.S. App. LEXIS 16931 (6th Cir. July 30, 2001), the Sixth Circuit held that a microbroadcaster could not raise constitutional defenses against the FCC's motion for an injunction in district court where the FCC sought to enforce an already existing cease and desist order under 47 U.S.C. § 401(b).[1]

Contrary to the United States' contention, Opp. 2.b., *Szoka* does not in any way indicate that the Sixth Circuit is retreating from its position in *United States v. Any and All Radio Transmission Equipment* (*Strawcutter*), 204 F.3d 658 (2000), which held that a district court has jurisdiction to consider the constitutionality of FCC regulations when ruling on a forfeiture action. *Id.* at 667. *See Szoka*, 2001 U.S. App. LEXIS 16931 at *36 n.13 ("Our holding is not meant to cast any doubt on this court's prior holding in *Strawcutter*. We have discussed in detail the difference between the circumstances of this case . . . and those of *Strawcutter*."). *Szoka* does, however, highlight the uncertainty and unpredictability of this important area of the law. The *Szoka* court itself notes that *Neset* "runs contrary to [the Sixth Circuit's] decision in *Strawcutter*," *id.* at *34 n.11, and points out the further inconsistent results reached in *Fried, United States v. Dunifer*, 219 F.3d 1004 (9th Cir. 2000); and *Prayze FM v. FCC*, 214, F.3d 245 (2d Cir. 2000) ("*Prayze I*"). *See Szoka*, 2001 U.S. App. LEXIS 16931 at *33-*35.

The split in judicial authority here is even further underscored and exacerbated by the recent ruling denying the FCC's summary judgment motion in *Prayze FM v. FCC*, No. 3:98cv529 (D. Ct. June 6, 2001) ("*Prayze II*") (included in the appendix to this brief as A-1-A-11). The *Prayze II* district court began its consideration of its

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[1] Importantly, the FCC did not issue a cease and desist order in the instant case. The United States simply filed an action for injunctive relief in district court, the forum in which Neset seeks to raise a constitutional defense.

jurisdiction to hear a defense challenging the constitutionality of FCC regulations by noting the circuit split in this area of the law evinced by *United States v. Any and All Radio Station Transmission Equip.* (*"Fried"*), 207 F.3d 458 (8th Cir. 2000), and *United States v. Any and All Radio Station Transmission Equip.* (*"Strawcutter"*), 204 F.3d 658 (6th Cir. 2000). *See Prayze II*, No. 3:98cv529 at 10-11; A-9-A-11.[2] The court went on to note the lack of "definitive controlling case law" on the subject, *Prayze II* No. 3:98cv529 at 11, A-10, before ultimately holding that it had jurisdiction as a district court to review defendant Prayze's constitutional challenges to the validity of FCC microbroadcasting regulations, which Prayze raised as a defense. *Id.*; A-10-A-11. The *Prayze II* decision, therefore, conflicts with this case and *Fried* and comes down on the side of *Strawcutter*.

These recent decisions display the futility of the United States' attempt to minimize the clear conflict that exists in this vital area where core constitutional rights are at stake. The new decisions both highlight and compound the need for this Court to resolve once and for all the question of whether federal district courts have jurisdiction to consider the constitutionality of FCC regulations as defenses to FCC actions initiated within those courts.

3. The United States' other miscellaneous arguments against this Court granting the Petition are equally unpersuasive. The United States contends that the resolution of the current disagreement over district court jurisdiction will not affect the ultimate outcome of the instant litigation, *see* Opp. 2.a. This is simply untrue. If Petitioner Neset had the opportunity to raise his constitutional defenses in the injunction action and succeeded in proving the unconstitutionality of the FCC regulations, the district court could not go on to enforce the very regulation it had declared an unconstitutional violation of his rights.

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[2] The *Prayze II* court refers to these decisions as *"Laurel Avenue"* and *"Maquina Musical"* respectively.

Clearly, the general requirement that a broadcaster be licensed does not violate the First Amendment, *see* Opp. 13, but unconstitutionally applied licensing requirements can in fact violate the First Amendment and, accordingly, form a proper basis for equitable relief.

To support its contrary position, the United States relies heavily on *Prayze I* where the court declined to resolve the jurisdictional question because it believed the FCC likely to prevail on the merits of the case. *See* Opp. 14 n.7; *Prayze I*, 214 F.3d at 251. However, as already discussed, the district court in the same case has since seen fit not only to resolve the jurisdictional issue, but also to resolve it in the defendant microbroadcaster's favor. *Prayze II*, No. 3:98cv529 at 11; A-10. This demonstrates that "the outcome on the merits of this sort of case" is not nearly so clear as the United States believes and certainly not clear enough to moot the question of the legality of district court jurisdiction. Opp. 14 n.7. The district court in *Prayze II* is permitting the microbroadcaster to proceed to the merits of its constitutional claim. Neset ultimately seeks to do the same thing upon remand to the district court.

The argument that the FCC's new low power rules may substantially reduce the future significance of this case, Opp. 16-17, is no more convincing. As the United States itself explains, under the current regulatory regime, no applicant that has *ever* engaged in any manner of unlicensed broadcasting is eligible for a low power FM license. Opp. 6-7; Radio Broadcasting Preservation Act of 2000, H.R. 5548, § 632. Therefore, an entire generation of microbroadcasters and low powered stations and their progeny continue to be flatly prohibited from low power broadcasting. Moreover, the new law simply does not impact ongoing litigation concerning microbroadcasters. And as the recent *Szoka* and *Prayze II* decisions from this year demonstrate, these cases continue to arise throughout the federal courts, with courts issuing conflicting rulings on an important question of federal jurisdiction.

Furthermore, because former microbroadcasters are explicitly prohibited from obtaining a license under the new law, microbroadcasters who engage in broadcasting, at least in several judicial circuits, will still be deprived of the ability to raise constitutional defenses in district court even when they are *defendants* in enforcement actions. The new law does not dissipate the need for resolution by this Court of, as the Eighth Circuit previously acknowledged, "an important [question] for the statutory scheme created by Congress for the regulation of broadcasting" and a question on which there is no "precise precedent." *Fried*, 207 F.3d at 462.

CONCLUSION

The United States' arguments have only served to highlight the need for this Court to resolve the crucial issues presented in this case. Petitioner Neset therefore respectfully urges this Court to grant the Petition.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PRAYZE FM a/k/a INCOM, LLC, MARK BLAKE, and LORETTA SPIVEY, Plaintiffs,	:	3:98cv375 (WWE)
v.	:	
UNITED STATES OF AMERICA/FEDERAL COMMUNICATIONS COMMISSION, Defendant	:	

UNITED STATES OF AMERICA/FEDERAL COMMUNICATIONS COMMISSION,	:	3:98cv529 (WWE)
v.	:	
PRAYZE FM a/k/a INCOM, LLC, MARK BLAKE, and LORETTA SPIVEY, Defendants	:	

RULING ON PLAINTIFF UNITED STATES OF AMERICA / FEDERAL COMMUNICATION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

This case arises from the actions of the defendants,[1] Prayze FM a/k/a Incom, L.L.C., Mark Blake, and Loretta Spivey ("Prayze"), in broadcasting from a low power FM radio station without a license. With the permission of this Court, Prayze has filed a second amended complaint [doc. # 116] upon which this ruling will be based. The amended complaint alleges that Federal Communications Commission ("FCC") regulations regarding microradio broadcasting, as modified by the Radio Broadcasting Preservation Act of 2000, (1) violate the First and Fourteenth Amendments to the Constitution of the United States, both facially and as-applied, because the requirement of minimum distance separations between new LPFM stations and full power FM radio stations on third-adjacent channels is not narrowly tailored to serve the substantial government interest in protecting full power FM radio stations from signal interference within their protected contours, or in any other substantial governmental interest [Count One]; (2) violate the plaintiffs' First Amendment rights, facially and as-applied, because the automatic and permanent disqualification of any LPFM applicant previously engaged in unlicensed broadcasting

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[1] Prayze FM is the plaintiff in the original complaint which sought to enjoin the FCC from shutting down the radio station broadcasts. The FCC subsequently filed a motion for injunctive relief against Prayze FM, and the cases were consolidated by this Court's order dated 5/12/98.

is not narrowly tailored to serve the substantial governmental interest in ensuring that broadcast licensees are truthful and reliable [Count Two]; (3) violate the First and Fourteenth Amendments of the Constitution, both facially and as-applied, because it denies LPFM applicants that have previously engaged in unlicensed broadcasting the same opportunity afforded other broadcast license applicants that have previously engaged in serious misconduct, including FCC-related misconduct, to present mitigating evidence and demonstrate that they can operate a broadcast station in the public interest with no likelihood of future misconduct [Count Three]; and (4) violate the plaintiffs' First Amendment rights by attempting to punish a particular viewpoint by automatically and permanently disqualifying unlicensed microbroadcasters from obtaining LPFM licenses [Count Four]. In this count, the plaintiffs claim that Congress has singled out one class of broadcast license applicants for an especially harsh sanction, one not imposed on other broadcast license applicants that have previously engaged in other equally, if not more serious, types of FCC and non-FCC related conduct, because this class of unlicensed broadcasters espoused that civil disobedience was an appropriate course of action, given the refusal of the FCC to repeal what the microbroadcasters viewed in the 1990s as an ill-conceived, outmoded, and unconstitutional ban on low power FM broadcasting. The plaintiffs allege that this attempt by Congress to punish a particular viewpoint violates the First Amendment to the United States Constitution.

The FCC asserts that there are no genuine issues of material fact in dispute, and that the district court is not

the proper forum for a decision in this case, in that the court of appeals has exclusive jurisdiction to review the validity of FCC regulations under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342. Now pending before the Court is the plaintiff FCC's motion for summary judgment [doc. # 100]. For the reasons stated below, the FCC's motion will be denied.

DISCUSSION

Background

The parties have submitted Local 9(c) Statements and evidentiary submissions that represent the following undisputed facts. In December, 1996, the Field Office of the Compliance and Information Bureau of the FCC in Boston, Massachusetts, began an investigation into the existence of a possible unlicensed FM radio station transmitting from the Bloomfield, Connecticut, area. Alerted from newspaper clippings, telephone calls and written correspondence, the FCC discovered a transmission on the frequency 105.3 megahertz (MHZ) identifying itself as Prayze FM and WPRZ. As of December 1996, the FCC had not authorized any radio station to operate in the Bloomfield, Connecticut, area with the call sign WPRZ on 103.5 MHZ.

On March 4, 1997, an FCC engineer located the signal source of the radio transmission to be in the vicinity of 701 Cottage Grove Road, Bloomfield, Connecticut. Articles in the Hartford Courant reported that the radio station at that location, identified as Prayze FM, was being operated by the defendant Mark Blake. On March 19,

1997, the FCC was informed that Prayze FM's transmission was causing interference with one licensed station's signal, and was having a negative economic impact on another licensed station. On various occasions, an FCC engineer made field strength measurements of the station's signal, and found that the measured signal exceeded FCC rules regulating low power radio stations by 600 to 1000 times the maximum signal strength allowed.

On November 2, 1999, this Court granted the FCC's motion for a preliminary injunction, enjoining Prayze FM from making radio transmissions within the United States until Prayze obtained a license from the FCC. The Second Circuit affirmed this Court's ruling on June 5, 2000. *Prayze FM v. Federal Communications Commission*, 214 F.3d 245 (2d Cir. 2000).

Since the date of the Court's ruling on the FCC's motion for preliminary injunction, the FCC has drastically changed its policy regarding microbroadcasting by amending its regulations to allow the licensing of low-power radio stations ("LPFM"). On January 20, 2000, the FCC promulgated regulations creating two new classes of low-power radio stations with power levels of 10 and 100 watts, to be operated on a noncommercial basis only, for the purpose of promoting diversity and localism in radio broadcasts. Unlicensed microbroadcasters were allowed to obtain new licenses only if they certified that they either (1) voluntarily ceased unlicensed broadcasting no later than February 26, 1999, without being specifically told to by the FCC; or (2) ceased unlicensed broadcasting within 24 hours of being told to do so by the FCC. These requirements were waivable if good cause was shown.

On or about August 29, 2000, defendant Mark Blake applied for a license to broadcast under the new corporate name, Good News Broadcasting, LLC ("Good News"), requesting a waiver of the FCC's rules disqualifying those applicants who continued to operate unlicensed radio stations after February 26, 1999, or after being warned by the FCC to shut down.

On December 15, 2000, Congress enacted the Radio Broadcasting Preservation Act of 2000, further muddying the waters regarding the rules for low power FM radio service by severely limiting, perhaps eviscerating, the FCC's January, 2000, regulations allowing the development and licensing of noncommercial microradio stations. The Act directed the FCC to modify its rules to prescribe minimum distance separations between new LPFM stations and full power FM radio stations on third-adjacent channels (an action the FCC previously determined was unnecessary), barred the FCC from eliminating third-adjacent channel protection from LPFM stations without prior Congressional approval, and directed the FCC to amend its LPFM rules to prohibit all applicants who had previously engaged in unlicensed broadcast operations from becoming LPFM licensees.

Standard of Review for Summary Judgment

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and its is clear that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Only when reasonable minds could not

differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F. 2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849 (1991).

The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. *American International Group, Inc. v. London American International Corp.*, 664 F. 2d 348, 351 (2d Cir. 1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). If a nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, then summary judgment is appropriate. *Celotex Corp.*, 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. *Anderson*, 477 U.S. at 249.

In its motion for summary judgment, the FCC asserts that there have been no material changes in circumstances, that there are no factual disputes between the parties, and that the legal dispute has effectively been decided in favor of the government in view of this Court's decision to enter injunctive relief, as well as by the Second Circuit's decision in *Free Speech v. Reno*, 200 F.3d 63 (1999) (affirming the district court's granting of a preliminary injunction against an unlicensed low power radio station operator who challenged the constitutionality of microbroadcasting regulations).

Prayze opposes the motion for summary judgment on the grounds that the legal dispute has not been

resolved in favor of the government, and that the government is wrong in asserting that no material changes in circumstances have occurred since Prayze ceased broadcasting. Specifically, Prayze argues that it is entitled to make a facial constitutional challenge to the FCC regulations in this action. Prayze also asserts that it may make an as-applied challenge to the statute since the application and waiver request are an exercise in futility after the passage of the Radio Broadcasting Preservation Act of 2000.

At the time of the Second Circuit's decision in *Prayze FM*, 214 F.3d at 251, Prayze had not applied for a conventional FCC license to broadcast and a waiver of the regulations (that on their face would prohibit it from obtaining such a license). The Second Circuit was clear in its holding that although Prayze did not yet have standing to raise its as-applied challenge, it did have standing to bring a facial challenge to the FCC regulations.

If, as Prayze asserts, its efforts in applying for a license and waiver are futile, Prayze would have standing to bring its as-applied challenge to the regulations.

The Radio Broadcasting Preservation Act of 2000, H.R. 5548, § 6329a), which was signed into law on December 21, 2000, states in pertinent part that

> (1) The Federal Communications Commission shall modify the rules authorizing the operation of low-power FM radio stations, as proposed in MM Docket No. 99-25, to –
>
> (A) prescribe minimum distance separations for third-adjacent channels (as well as for co-

channels and first- and second adjacent channels); and

(B) prohibit any applicant from obtaining a low-power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934 (47 U.S.C. 301).

This Court agrees with Prayze's assertions regarding futility, and finds that the Act expressly excludes Prayze FM or its progeny from obtaining a low power Fm license. If the FCC issued a license to Good News, based on the application filed by Mark Blake, it would be in violation of the Radio Broadcasting Preservation Act of 2000. This Court finds futility, and consequently finds standing on the as-applied challenge.

This Court adheres to the Second Circuit's ruling, finding standing on the facial challenge, and finds that there are genuine issues of material fact in dispute. The motion for summary judgment will be denied.

JURISDICTION

The FCC also raises the issue of jurisdiction, claiming that 47 U.S.C. § 402(a) and 28 U.S.C. § 2342 confine the review of the validity of FCC regulations to the court of appeals, not the district courts. Prayze asserts that this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1346(2).

Section 2342 of Title 28 states, in pertinent part, that the Court of Appeals has exclusive jurisdiction to enjoin, set aside, suspend, or determine the validity of all final orders of the Federal Communications Commission made

reviewable by 47 U.S.C. § 402(a); § 1331 states that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. The Second Circuit addressed the question of district court jurisdiction in considering the constitutionality of FCC regulations, and found that the issue was unclear. *Prayze FM*, 214 F.3d at 250. The Eighth Circuit ruled that district courts were barred from hearing constitutional challenges to FCC regulations, *United States v. Any and All Radio Station Transmission Equip.* ("Laurel Avenue"), 207 F.3d 458, 463 (8th Cir. 2000), while the Sixth Circuit came to the opposite conclusion, reasoning it was unlikely that Congress intended to deprive defendants in forfeiture actions of the ability to raise constitutional defenses to those actions. *United States v. Any and All Radio Station Transmission Equip. ("Maquina Musical")*, 204 F.3d 658, 667 (6th Cir. 2000).

In resolving this issue without any definitive controlling case law, this Court will rely on the plain language of 28 U.S.C. § 1331, and hold that the present case is a civil action arising under the Constitution of the United States, and as such the district court has original jurisdiction. Had the Congress intended for the court of appeals to determine the constitutionality of all final orders of the FCC, this Court presumes Congress would have added that specific language to the other actions falling under the exclusive jurisdiction of the court of appeals in 28 U.S.C. § 2342.

CONCLUSION

For the reasons set forth above, the plaintiff FCC's motion for summary judgment [doc. # 100] is DENIED on all counts, and this Court retains jurisdiction over the case pursuant to 28 U.S.C. § 1331.

SO ORDERED on this 6th day of June, 2001, at Bridgeport, Connecticut.

/s/ Warren W. Eginton
Warren W. Eginton, Senior
U.S. District Judge